No. (illegible)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The Supreme Court of the United States

D. EPPS LACY and JAMES LACY,

Petitioners,

v.

BOARD OF SUPERVISORS OF HALIFAX COUNTY, VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a taking to benefit and serve a particular class of identifiable individuals satisfy the public use requirement of the Fifth Amendment to the United States Constitution and this Court's interpretation of the Public Use Clause under Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005)?

PARTIES TO THE PROCEEDING

Petitioners:

D. Epps Lacy
James Lacy

Respondent:

Board of Supervisors of Halifax County, Virginia

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, D. Epps Lacy and James Lacy, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Halifax County Circuit Court in the Commonwealth of Virginia, dated April 24, 2006, and the Virginia Supreme Court's decree denying review of such order, dated October 25, 2006.

OPINIONS AND ORDERS BELOW

Board of Supervisors of Halifax County Virginia v. D. Epps Lacy, *et al.*, No. CL05-125, (Va. Cir. 2006). (App. 2a).

Board of Supervisors of Halifax County Virginia v. D. Epps Lacy, *et al.*, No. CL05-125, *cert. denied*, (Va. Oct. 25, 2006) (No. 061491). (App. 1a).

JURISDICTION

The Petitioners seek review of the orders entered on April 24, 2006 by the Halifax County Circuit Court in the Commonwealth of Virginia and the decree denying review of such order which the Virginia Supreme Court entered in this action on October 25, 2006. The jurisdiction of this Court to review the order entered by the Halifax County Circuit Court in the Commonwealth of Virginia and the subsequent decree rendered by the Virginia Supreme Court is invoked and proper under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

A. Procedural History

On April 5, 2005, the Board of Supervisors of Halifax County (hereinafter "Board") filed a Petition for Condemnation to take the property of D. Epps Lacy and James Lacy (hereinafter "Lacys") by eminent domain. The Lacys duly filed an Answer and Grounds of Defense, stating that the taking was constitutionally impermissible because it was for the purpose of serving and benefiting their neighbor who asked for and funded the taking only after unsuccessfully trying to purchase the property from the Lacys. On September 14, 2005, the Virginia Circuit Court for Halifax County held a hearing regarding public use and the constitutionality of the taking. During this hearing, the Lacys presented evidence that this taking is impermissibly for private purposes. The court also held a hearing on April 12, 2006 solely to determine if the Board's Petition was filed in accordance with Virginia statutory requirements. Due to the Board's failure to follow state statutory requirements, the Board filed an Amended Petition on November 17, 2005. The Lacys duly filed an Answer to the Amended Petition. The

Board's stated purpose for the taking is identical in both its Petition and Amended Petition.

On November 22, 2005 and February 6, 2006, the circuit court issued interim orders denying the Lacys' defenses to the taking and declaring that the taking was constitutionally permissible. The circuit court entered a final order, which expressly preserved the Lacys' rights of appeal, on April 24, 2006. Thereafter, the Lacys timely filed a notice of appeal with the Supreme Court of Virginia, which denied their appeal by a judicial decree entered on October 25, 2006. The Lacys now file this Petition for Writ of Certiorari, respectfully praying that this Court grant their appeal and vindicate the Constitution.

B. Facts

The Board readily admits that it seeks to take the Lacys' property by eminent domain to serve and benefit the Lacys' neighbor, the King family. (Pet. ¶ 6; Amend. Pet. ¶ 7; Tr. Sep. 14, 2005 at 75, 78, 82, 91-92) (hereinafter "Sep. Tr."). The Lacys have a family farm that they have owned and farmed for generations. (Sep. Tr. at 160). The Lacys' farm abuts Route 614, which is a state highway. (Sep. Tr. at 160).

The King family owns property lying behind the Lacys' property, and the Kings want the Lacys' property to develop their own land. (Sep. Tr. at 45-46, 160). The King's property is known as the "King property" or "King Village property." The Kings access their property by an easement that traverses

a dirt and gravel farm road that runs 9/10 of a mile from Route 614 through the Lacys' property to the King's property. (Sep. Tr. at 44, 57, 71, 76, 161, 175). This farm road (hereinafter "driveway") literally serves as the King's driveway. (Sep. Tr. at 44, 57, 161, 175). Pursuant to their rights under the easement, the King's have maintained their driveway by grading it and placing gravel upon it. (Sep. Tr. at 45, 57-58, 62, 161).

The King's property is a family subdivision. (Sep. Tr. at 44, 56, 120-21). Local ordinances prohibit families with family subdivisions from subdividing and selling lots to non-family members unless the property abuts a public road meeting state highway department standards. (Sep. Tr. at 121). Thus, because the King's property is a family subdivision, the King family cannot subdivide its property and sell lots to non-family members unless a street meeting state highway department standards is constructed and run from Route 614 to their property. (Sep. Tr. at 121). The acquisition of the Lacys' property and construction of such a road allows the Kings to subdivide their property and sell lots to non-family members for profit. (Sep. Tr. at 121).

The Kings contacted the Lacys and offered to purchase the Lacys' property in order to construct such a road across the Lacys' property. (Sep. Tr. at 46). When the Lacys declined to sell their property, the Kings contacted the Board and asked the Board to take the Lacys' property for them. (Sep. Tr. at 46-47, 59, 162, 12). After the Board obtained an appraisal to get an estimate of the cost to acquire the

Lacys' property, the Kings gave the Board a check in the exact amount of the Board's estimate of the acquisition costs. (Sep. Tr. at 49, 58). At the hearing on September 14, 2005, counsel for the Board informed the court that the Board would return the money the Kings had given it for the acquisition, if the court so desired. (Sep. Tr. at 191-92).

After receiving the check from the Kings, the Board granted the King's request to take the Lacys' property, and the Board filed a Petition for Condemnation (hereinafter "Petition") to take the Lacys' property by eminent domain. The Board plainly states that the purpose of the taking is to serve and benefit the Kings. (Pet. ¶ 6; Amend. Pet. ¶ 7). The Board declared in both its Petition and Amended Petition that the "public use for which the property is to be taken is the construction of a new access road to serve the said King Village property." (Pet. ¶ 6; Amend. Pet. ¶ 7) (emphasis added). The "King Village property" only includes the Kings, as the "King Village property" is simply the King's property. (Sep. Tr. at 43-44, 56, 121). Only the Kings live in the King Village property. (Sep. Tr. at 43-44, 56, 121). The Board's Resolution authorizing the taking states that the Board is taking the Lacys' property to benefit "those who reside in King Village." (Exh. B of Pet.). "[T]hose who reside in King Village" only includes the Kings. (Sep. Tr. at 43-44, 56, 121). The Road Viewers' Report obtained by the Board and admitted into evidence at the hearing on September 14, 2005 confirms that the taking is to "serve the needs of the residents of King Village." (Sep. Tr. at 82; Viewers' Rpt. § 1). "[T]he residents of King Village" includes only the Kings,

who are the only residents of King Village. (Sep. Tr. at 43-44, 56, 121).

The trial testimony of the Board members further confirmed that the taking is to benefit the King family. At the hearing on September 14, 2005, the Board testified that "[t]he road will serve the needs of the residents of King Village," that the purpose of the taking is "[t]o give better access into the King Village . . . [and] to provide better access to the King Village residents," that the taking "serves primarily the King Village residents," and that the road will be used "[p]rincipally [by] the King Village residents and people who may be visiting them." (Sep. Tr. at 75, 78, 82, 91-92). Notably, the Board's Petition does not state that the taking is to benefit the public or any person other than the Kings, despite the fact that one other family, the Roberts family, uses the very beginning of the King's driveway to access their own property. (Sep. Tr. at 50-51). After the driveway passes the Robert's house, it meanders through the Lacys' farm to the King's property. The Board has never asserted that it is taking the property to serve and benefit the Roberts. Instead, the Board has been clear in stating that the road is to serve and benefit the Kings.

The Board also stated that the road would benefit the Kings by providing them better access to their property, which the Board claimed would allow emergency vehicles better access to the King's property and would provide better school bus service for the Kings. (Pet. ¶ 6; Amend. Pet. ¶ 7). However, the Board never consulted any of the County's own

emergency departments regarding their vehicles ability to traverse the King's driveway. (Sep. Tr. at 20-21, 73, 82, 85-86). The Board also never consulted personnel in the school system regarding the safety of the existing school bus service to the Kings. (Sep. Tr. at 21, 73, 165). Moreover, the Director of Transportation for Halifax County Schools testified that the existing school bus service for the Kings is safe and has been safe for years. (Sep. Tr. at 115-116).

REASONS FOR GRANTING THE WRIT

I. The Taking in this Case Is Constitutionally Impermissible Under the Fifth Amendment of the United States Constitution and this Court's Interpretation of the Fifth Amendment in Kelo Because the Stated and Undisputed Purpose of the Taking Is to Serve and Benefit a Particular Class of Identifiable Individuals

The Board's taking in this case is constitutionally impermissible because the purpose of the taking is to benefit a particular class of identifiable individuals. In Kelo v. New London, this Court unequivocally stated that the Fifth Amendment of the United States Constitution prohibits condemnors from taking property "to benefit a particular class of identifiable individuals." 545 U.S. 469, 125 S. Ct. 2655, 2662 (2005). This Court further stated that a condemnor is "forbidden from taking [one person's] land for the purpose of conferring a private benefit on a particular private

party." Id. at 2661. This Court also declared that a condemnor is not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Id. Justice Kennedy noted in his concurrence that courts should "strike down a taking that by a clear showing, is intended to favor a particular party, with only incidental or pretextual [p blic] benefits . . . ." Id. at 2669.

The taking in Kelo did not run contrary to these principles because the purpose of the taking in Kelo was not to benefit a particular class of identifiable individuals. While Pfizer, Inc. ultimately became the beneficiary in Kelo, the taking was not for the purpose of bestowing a benefit on Pfizer. As this Court stated, "[t]he identities of those private parties [who ultimately benefited from the taking] were not known when the plan was adopted." Id. at 2662, n.6. In fact, Justice Kennedy noted in his concurring opinion that the trial court made extensive findings and determined that "benefiting Pfizer was not the primary motivation or effect" of the taking. Id. at 2670.

Contrary to Kelo, the Board's stated and undisputed purpose for the taking in this case is to bestow a benefit on the Kings, the Lacys' neighbor and "a particular class of identifiable individuals." Unlike Pfizer in the Kelo case, the Kings were always the intended beneficiary of the taking in this case. The taking occurred precisely because the Kings asked the Board to take the Lacys' property for their benefit. After the Kings unsuccessfully attempted to buy the property from the Lacys, the

Kings asked the Board to take the Lacys' property to construct the road the Kings desired. The Kings also gave the Board a check for the acquisition costs. Furthermore, the Kings are the only persons who will receive any conceivable use or benefit from the taking.

The Board admits that it is taking the Lacys' property to serve and benefit the Kings, a particular class of identifiable individuals. The Board declared in both its Petition and Amended Petition that the "public use for which the property is to be taken is the construction of a new access road to serve the said King Village property." (Pet. ¶ 6; Amend. Pet. ¶ 7) (emphasis added). The "King Village property" is nothing more than the King's property, which is known locally as the King Village property. Only the Kings live in King Village, and the taking will only "serve" the Kings. Notably, neither the Petition nor the Amended Petition states that the purpose of the taking is to benefit anyone other than the Kings, and neither document proposes any purpose other than benefiting and serving the Kings and their property.

The Board's Resolution authorizing the taking states that the Board is taking the Lacys' property to benefit "those who reside in King Village." (Exh. B of Pet.). The Kings are the only persons "who reside in King Village." The Road Viewers' Report obtained by the Board and admitted into evidence at the hearing on September 14, 2005 confirms that the taking is to "serve the needs of the residents of King Village." (Sep. Tr. at 82; Viewers' Rpt. § 1). The Kings are the only "residents of King Village."

The Board's testimony at trial further confirmed that the purpose of the taking is to "serve" the Kings. (Sep. Tr. at 75, 78, 82, 91-92). At the hearing on September 14, 2005, the Board testified that "[t]he road will serve the needs of the residents of King Village," that the purpose of the taking is "[t]o give better access into the King Village . . . [and] to provide better access to the King Village residents," that the taking "serves primarily the King Village residents," and that the road will be used "[p]rincipally [by] the King Village residents and people who may be visiting them." (Sep. Tr. at 75, 78, 82, 91-92).

Other than the Board's plainly stated purpose of benefiting the Kings, no conceivable purpose for the taking exists. The driveway for which the Board seeks to take the Lacys' property serves and benefits only the King family and their visitors. (Sep. Tr. at 75, 78, 82, 91-92). Any benefit for the general public will be purely conjectural; the only conceivable persons who would use the driveway are the Kings and their visitors. The driveway or proposed road is 9/10 of a mile long and dead-ends into the King's property. (Sep. Tr. at 44, 76). The driveway is not a thoroughfare or connector road. It literally goes nowhere but to the King's property and serves as the King's driveway. As the Board testified, the only persons who will be served by this road are the Kings and their visitors. (Sep. Tr. at 75, 78, 82, 91-92).

As the Board's own Petition, Amended Petition, Resolution, and other documents state, the only purpose of the taking is to benefit the Kings by

providing them better access to their property. In its Petition and Amended Petition, the Board states that the taking will benefit the Kings by providing better access to the King's property which will allow emergency vehicles better access to the King's property and provide better school bus service for the Kings. (Pet. ¶ 6; Amend. Pet. ¶ 7). Notably, the Board never stated that it was providing better access for any other party.

Aside from further proving that the sole purpose of the taking was to benefit the Kings—the very party who asked for the taking, funded the taking, and the only party to benefit from the taking—the two alleged benefits of the King's increased access demonstrate that any alleged public purpose is a mere pretext for bestowing a private benefit on the Kings. Although the Board claims that the increased access will benefit the Kings by allowing emergency vehicles to better traverse the driveway, the Board never consulted any of the County's own emergency departments regarding their vehicles ability to traverse the King's driveway. (Sep. Tr. at 20-21, 73, 82, 85-86). The Board also never consulted personnel in the school system regarding the safety of the existing school bus service to the Kings. (Sep. Tr. at 21, 73, 165). Moreover, the Director of Transportation for Halifax County Schools testified that the school bus service for the Kings is safe and has been safe for years. (Sep. Tr. at 115-116).

Taking property specifically to serve a private owner and to provide a private owner better access, regardless whether the private owner is a family, a

business, or a developer is a taking for an impermissible private purpose. Just as government cannot take property specifically to benefit a private developer, Wal-Mart, Costco, or other businesses, it cannot take property to benefit a politically connected family. If government were permitted to take property to benefit private parties as it has done in this case, the time-honored process of land development in America would be drastically altered. For example, if government is permitted to take one person's property to serve and benefit another, developers and businesses would no longer be required to acquire all the land and access necessary for their developments. Instead of requiring the developer or business to acquire the necessary land and then dedicate the roads for public use, the government could take the necessary land for the benefit of these private parties and provide the access for them. Developers and businesses could purchase landlocked property and have the government take the surrounding property of others to provide the access the developer or business desires to develop their property for profit. A politically connected developer or business could get rich off the public coffers and the forced sales of other people's private property.

In the end, the greatest effect of the taking and construction of the proposed road in this case is that it will greatly increase the value of the King's property because the construction of a "public" road meeting state highway department standards will allow the Kings to subdivide their property and sell lots for profit to persons outside their family. (Sep. Tr. at 121). The King's property is a family

subdivision. (Sep. Tr. at 44, 56, 120-121). Local zoning ordinances prohibit families who have family subdivisions from subdividing their property and selling lots to non-family members unless a street meeting state highway department standards abuts their property. (Sep. Tr. at 121). Thus, by taking the Lacys' property and constructing a road meeting state standards, the Kings will be able to subdivide their property and sell lots for profit to persons outside the King family. The ability to sell lots to non-family members will greatly increase the value of the King's property.

Importantly, the Board is not taking the Lacys' property as part of a general economic development project, to eliminate blight, or to serve general transportation needs. The Board's sole stated purpose for this taking is to specifically serve the Kings by providing the Kings better access; the Board has never claimed that it is taking the Lacys' property for anything other than serving the Kings and providing the Kings better access. The Board is not taking the Lacys' property for a redevelopment project or to remove a harmful or noxious use of property. The Board is not taking the Lacys' property to provide for general transportation needs. The Board is not taking the Lacys' property to widen an existing road, to relieve traffic congestion, to provide for safety on a public highway, to alter existing access on a public road, or to meet the general transportation needs of the community. The Board never stated that it was taking the Lacys' property to construct a road to meet general transportation needs.

Instead, the Board seeks to take the Lacys' property to construct a driveway to serve and benefit the Kings. The Board tries to legitimize its impermissible taking and clothe it with constitutionality simply by making the driveway a "public" road. The Board readily admits that the taking is specifically intended to benefit the Kings, a particular class of identifiable individuals. In fact, the Board readily admits that hundreds of private roads just like the King's driveway exist in Halifax County. The Lacys themselves live along private driveways just like the Kings. As the Board admits, the Board seeks to take the Lacys' property to provide the Kings better access to their property, which will give the Kings the ability to develop their property for profit. Even if the Fifth Amendment allowed takings for the general welfare, a much broader term than "public use," this taking would be impermissible because it is admittedly not for the general welfare or general transportation needs of the community. The Board's stated purpose for this taking is to benefit and serve the Kings.

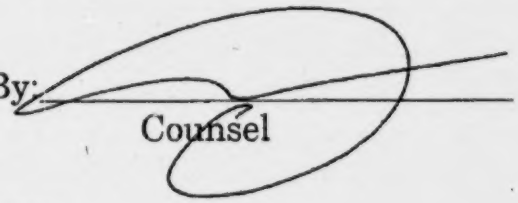
Contrary to the principles this Court expressed in Kelo, the Board's taking in this case is impermissibly intended "to benefit a particular class of identifiable individuals." The Board is taking the Lacys' property specifically to serve and benefit the Kings, the Lacys' neighbor who asked the Board to take the Lacys' property after the Kings unsuccessfully attempted to buy the Lacys' property themselves. As this Court stated in Kelo, the Constitution prohibits condemnors from taking one person's property "to benefit a particular class of identifiable individuals." Kelo, 545 U.S. 469, 125 S.

Ct. at 2662. Condemnors are "forbidden from taking [one person's] land for the purpose of conferring a private benefit on a particular private party." Id. at 2661. The application of these principles makes clear that the Board's attempted taking in this case is unconstitutional.

CONCLUSION

Just as Wal-Mart or a private developer cannot purchase landlocked or limited-access property and then ask the local government to take the neighboring property by eminent domain in order to provide them better access, the Board cannot take the Lacys' property simply to provide better access for the Kings. The Virginia Supreme Court erred by failing to declare the Board's taking to be unconstitutional because this taking is impermissibly intended "to benefit a particular class of identifiable individuals," and the Board's stated purpose was to bestow a benefit on the Kings—a particular class of identifiable individuals. Kelo, 545 U.S. 469, 125 S. Ct. at 2661-62. The taking in this case is clearly for private purposes that run afoul of the Fifth Amendment of the United States Constitution and this Court's interpretation of the Fifth Amendment under Kelo.

D. EPPS LACY AND
JAMES LACY



By: _____
Counsel

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 25th *day of* October, 2006.

D. Epps Lacy, et al., Appellants,

against Record No. 061491
Circuit Court No. CL05-125

Board of Supervisors of
Halifax County, Appellee.

From the Circuit Court of Halifax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ Ebby Edwards
Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR HALIFAX COUNTY

BOARD OF SUPERVISORS OF HALIFAX COUNTY VIRGINIA	)	
Petitioner,	)	
v.	)	Case No. CL05-125
D. EPPS LACY, *ET AL.*	)	
Respondents.	)	

FINAL ORDER

The parties to this proceeding have represented to the Court that the dispute between the parties as to the amount just compensation has been resolved, and the entry of a Final Order herein is therefore appropriate, it is, accordingly, hereby ADJUDGED and ORDERED as follows:

a. The Settlement Agreement entered into between the parties is attached hereto and is hereby incorporated into this Final Order.

b. There is hereby reserved to Respondents all their rights to appeal the rulings of this Court herein.

c. Once Respondents' rights of appeal have been exhausted and their appeals conclude with this Court's rulings being affirmed, but not before then, Petitioner shall deposit with the Clerk

of this Court the sum of FIFTY THOUSAND & NO/100 ($50,000.00) DOLLARS, which amount has been determined by agreement between the parties to constitute just compensation.

d. Upon payment by Petitioner of said $50,000.00 to the Clerk of this Court, the Clerk shall cause a true copy of this Final Order to be recorded in the deed books for Halifax County, duly indexed in the name of D. Epps Lacy and James Lacy, as parties grantor, and in the name of Halifax County, Virginia, as party grantee.

e. Upon recordation by the Clerk as aforesaid, clear and marketable title to the property described in Petitioner's Amended Petition for Condemnation shall automatically vest in Halifax County, Virginia.

f. Once clear and marketable title has vested in Halifax County, Virginia, the Clerk shall disburse said $50,000.00 to Waldo & Lyle, P.C., attorneys for Respondents.

g. If there are any encumbrances on the title which vests in Halifax County, Virginia, as aforesaid, said disbursement shall be delayed until entry of an Order by which the lien of each such encumbrance is transferred and shifted from title to the subject property to the aforesaid $50,000.00 deposit.

h. The just compensation hearing scheduled for May 8, 2006, is hereby cancelled.

The Clerk is directed to send copies of this Final Order to all counsel of record.

Entered this [24th] day of April, 2006.

/s/ William N. Alexander, II
Judge

We ask for entry of this Order:

/s/ Russell O Slayton, Jr.
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VIRGINIA: IN THE CIRCUIT COURT FOR HALIFAX COUNTY

BOARD OF SUPERVISORS OF HALIFAX COUNTY VIRGINIA	)	
Petitioner,	)	
	)	Case No.
v.	)	CL05-125
D. EPPS LACY, *ET AL.*	)	
Respondents.	)	

INTERIM ORDER

The parties, by counsel, appeared before this Court on Wednesday April 12, 2006, in the Circuit Court of Halifax County for a hearing on the issues raised in Respondents' Memorandum of Law which was filed herein on March 14, 2006, on Petitioner's Memorandum filed herein on March 22, 2006, in response to Respondents' Memorandum of Law, and on Respondents' answer and grounds of defense filed in response to Petitioner's Amended Petition for Condemnation.

Respondents presented evidence in support of the issues raised in their Memorandum. The parties stipulated to certain facts and exhibits. At the conclusion of Respondents' evidence, Petitioner rested without presenting any additional evidence. After hearing argument of counsel on the matters so presented to Court, and upon consideration of all

evidence, law and arguments presented herein, the Court hereby ADJUDGES and ORDERS as follows:

1. All evidence introduced at the hearing held in this action on September 14, 2005, the briefs and memoranda thereafter filed by counsel, and the subsequent rulings and orders of this Court, are hereby incorporated into, and made a part of, the record of the April 12, 2006, proceeding.

2. The exhibits and testimony admitted into evidence at the April 12, 2006, hearing are hereby made a part of the record thereof.

3 All defenses raised by Respondents herein are hereby denied.

The only matter remaining before this Court being the issue of just compensation, this matter shall remain on the docket of this Court pending resolution of the issue of just compensation.

The Clerk is directed to send copies of this Interim Order to all counsel of record.

Entered this [24th] day of April, 2006.

/s/ William N. Alexander, II
Judge

We ask for entry of this Interim Order:

/s/ Russell O. Slayton, Jr.
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Counsel for Petitioner

Seen and objected to on the grounds in the record:

/s/ Henry E. Howell, III
Henry E. Howell, III, Esq. (VSB No. 22274)
Waldo & Lyle, P.C.
301 West Freemason Street
Norfolk, Virginia 23510
757-622-5812 (telephone)
757-622-5815 (telefax)

Counsel for Respondents

[HALIFAX COUNTY CIRCUIT COURT, VA
ROBERT W. CONNER, CLERK
A copy teste: /s/ illegible [ ] Clerk
[✓] Dsp. Clerk]

VIRGINIA: IN THE CIRCUIT COURT FOR HALIFAX COUNTY

BOARD OF SUPERVISORS OF HALIFAX COUNTY VIRGINIA	)	
Petitioner,	)	
	)	Case No.
v.	)	
D. EPPS LACY, *ET AL.*	)	
Respondents.	)	

INTERIM ORDER

The parties, by counsel, appeared before this Court on Wednesday April 12, 2005 in the Circuit Court for Halifax County with respect to the Respondents' defenses to the Petitioner's Amended Petition for Condemnation.

The parties previously appeared before this Court on September 14, 2005, and presented evidence on the Respondents' defenses to the Petitioner's original Petition for Condemnation. This Court entered its Interim Orders on November 22, 2005 and February 6, 2006 denying the Respondents' defenses and Motion to Dismiss.

At a telephone conference with counsel on Thursday, March 23, 2005, this Court ruled that the evidence presented to this Court at the September 14, 2005 hearing would not be presented again but would be incorporated into the record with respect to

this Court's consideration of the Respondents' defenses to the Amended Petition for Condemnation.

The Clerk is directed to send copies of this Interim Order to all counsel of record.

This matter shall be continued on the docket of this Court.

Entered this [12th] day of April, 2006.

/s/ William N. Alexander, II
Circuit Court Judge

We ask for Entry of this Order:

/s/ Gregory J. Haley
Gregory J. Haley (VSB No. 23971)
Gentry Locke Rakes & Moore, LLP
800 SunTrust Plaza
10 Franklin Road, S.E.
P.O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9368
(540) 983-9468 (Fax)

Russell O. Slayton, Jr., Esq. (VSB No. 14202)
C. Ridley Bain, Esq. (VSB No. 17713)
Slayton, Bain & Clary
411 South Hicks Street
Lawrenceville, VA 23868

Counsel for Petitioner

Seen and agreed:

/s/ Henry E. Howell, III
Henry E. Howell, III, Esq.
Waldo & Lyle, P.C.
301 West Freemason Street
Norfolk, Virginia 23510

Counsel for Respondents

[HALIFAX COUNTY CIRCUIT COURT, VA
ROBERT W. CONNER, CLERK
A copy teste: /s/ illegible [ ] Clerk
[✓] Dsp. Clerk]

VIRGINIA: IN THE CIRCUIT COURT FOR HALIFAX COUNTY

BOARD OF SUPERVISORS OF HALIFAX COUNTY VIRGINIA	)	
Petitioner,	)	
v.	)	Law No. CL05-125
D. EPPS LACY, *ET AL.*	)	
Respondents.	)	

INTERIM ORDER

The parties, by counsel, appeared before this Court on Wednesday, September 14, 2005, in the Circuit Court for Halifax County, Virginia, on the issue of whether Petitioner's purpose in initiating this condemnation proceeding constitutes a taking for a public purpose, and on the other issues raised by Respondents in challenge to Petitioner's right to the proposed taking, whereupon evidence was presented by counsel for Respondents in support of the defenses raised by them. At the conclusion of Respondents' evidence in support of their defenses, Petitioner moved to strike Respondents' defenses as to the public purpose issue. The Court took Petitioner's motion to strike under advisement. Petitioner then rested without presenting any additional evidence. The Court next heard argument from counsel for both Petitioner and Respondents, and post-hearing memoranda were filed by each.

Upon consideration whereof, consistent with the findings of fact, analysis and conclusions set forth in the Court's opinion letter to counsel dated November 15, 2005, which opinion letter is hereby incorporated into this Interim Order by reference, the Court hereby finds and holds as follows: the taking sought by Petitioner is for a public purpose and use; there is no evidence of fraud on the part of Petitioner; the actions of Petitioner in initiating and prosecuting this action are neither arbitrary nor capricious; the proposed taking is not for the benefit of "a particular class of identifiable individuals.

By Interim Order entered herein on November 22, 2005, this Court DENIED Respondents' defense which was based on the fact that plan sheets were not attached to the Petition which was initially filed herein. It is hereby ORDERED that each of the other defenses raised by Respondents, as a challenge to Petitioner's right to proceed with the taking which is the object of this action, be, and each is hereby, DENIED.

The Court notes the objection of Respondents to this ruling on the grounds stated in their pleadings and supporting memoranda, and as stated in oral argument.

The Clerk is directed to send copies of this Interim Order to all counsel of record.

This matter shall be continued on the docket of this Court.

Entered this [6th] day of [February], 2006.

/s/ William N. Alexander, II
Judge

We ask for the entry of this Order:

/s/ Russell O. Slayton, Jr.
Russell O. Slayton, Jr., Esq. (VSB No. 14202)
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Counsel for Petitioner

Seen and objected to:

/s/ Henry Howell, Jr.
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Counsel for Respondents

[HALIFAX COUNTY CIRCUIT COURT, VA
ROBERT W. CONNER, CLERK
A copy teste: /s/ illegible [ ] Clerk
[✓] Dsp. Clerk]

VIRGINIA: IN THE CIRCUIT COURT FOR HALIFAX COUNTY

BOARD OF SUPERVISORS OF HALIFAX COUNTY VIRGINIA	)	
Petitioner,	)	
	)	Law No.
v.	)	CL05-125
D. EPPS LACY, *ET AL.*	)	
Respondents.	)	

INTERIM ORDER

The parties, by counsel, appeared before this Court on Friday, October 21, 2005, by telephone conference and presented the Respondents' Motion to Dismiss and the Petitioner's Motion for Leave to Amend Petition for Condemnation. Based on the pleadings, the memoranda and other authorities submitted by the parties, and the arguments of counsel, the Court holds that the Respondents' Motion to Dismiss is hereby DENIED. The Petitioner's Motion for Leave to Amend Petition for Condemnation is GRANTED and the Petitioner shall have leave to file an Amended Petition for Condemnation by Thursday, November 17, 2005. The Respondents shall have fourteen (14) days to file their response. This Court's letter ruling dated November 3, 2005, is hereby incorporated by reference and made a part of this Order.

The Court notes the objection of the Respondents to this ruling on the grounds stated in their pleadings and supporting memoranda, and as stated in oral argument.

The Clerk is directed to send copies of this Interim Order to all counsel of record.

This matter shall be continued on the docket of this Court.

Entered this [22nd] day of November, 2005.

/s/ William N. Alexander, II
Judge

We ask for entry of this Order:

/s/ Russell O Slayton, Jr.
Russell O. Slayton, Jr., Esq. (VSB No. 14202)
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540-983-9368 (telephone)
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Seen and objected to [for reasons identified above:]

/s/ Henry E. Howell, III
Jeremy P. Hopkins, Esq. (VSB No. 48394)
Henry E. Howell, III. Esq. (VSB No. 22274)
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Counsel for Respondents

[HALIFAX COUNTY CIRCUIT COURT, VA
ROBERT W. CONNER, CLERK
A copy teste: /s/ illegible [ ] Clerk
[✓] Dsp. Clerk]

COMMONWEALTH OF VIRGINIA

TWENTY-SECOND JUDICIAL CIRCUIT
CIRCUIT COURT OF DANVILLE
CIRCUIT COURT OF FRANKLIN COUNTY
CIRCUIT COURT OF PITTSYLVANIA COUNTY

November 15, 2005

[Entered: November 15, 2005]

Mr. Jeremy P. Hopkins, Esquire
Waldo & Lyle, P.C. 301
West Freemanson Street
Norfolk, Virginia 23510

Mr. Russell O. Slayton, Jr., Esquire
Slayton, Bain and Clary
P.O. Box 580
Lawrenceville, Virginia 23868

RE: Halifax County Board of Supervisors v.
D. Epps Lacy and James Lacy
Case # CL05-125

Gentlemen:

Evidence was taken in this matter on September 15, 2005, in Halifax for the purpose of the Court determining whether the Petition for Condemnation filed by the Board of Supervisors of Halifax, Virginia, (Board) seeking to condemn a portion of the land of D, Epps Lacy and James Lacy, (Lacy) constitutes a taking for public use. The facts are not involved or complex.

The County seeks to take approximately 3.00 acres along with drainage easements over an old road leading from State Route 614 to a development known as Kings Village. Kings Village is a collection of homes conveyed to members of the Thaddeus King family. There are approximately thirteen (13) homes in Kings Village. The proposed road will also serve two other families located along the road between State Route 614 and Kings Village.

The existing road leading from State Route 614 to Kings Village has been used for well over twenty-five (25) years and the prescriptive right to use this road has been established and is unchallenged. Members of the King family and supporters have been trying to get a public road to this settlement for many years.

The present road is in such a state of disrepair that the school bus does not go down the road to pick up the children from Kings Village. There have been many instances in which fire trucks, fuel trucks and other service vehicles could not get down the road to service the community. The road is so narrow that two vehicles normally can't pass on the road.

If and when the road is constructed;, the road will become a part of Virginia's secondary highway system. The road will end in a cul-de-sac at Kings Village. It will be open for use by the public.

The Lacys contend that the Board is attempting to take the property for the benefit of "a particular class of identifiable individuals" and it is being taken only to serve the "needs of the residents

of Kings Village". The Lacys contend that the public use clause prevents any particular group from using the government and its power of eminent domain to take property for their benefit. They maintain the residents of Kings Village have the right to maintain the present roadway and if it were properly maintained any vehicles, service or otherwise, could successfully use the private road. The evidence does not establish that a particular group of individuals is using the government's power of eminent domain to take property for that group's benefit.

The Supreme Court of Virginia in Ottofaro, et al v. City of Hampton. 265 Va. 26, 31 (2003), citing from an earlier case stated that:

> "the *public use* implies possession, occupation, and enjoyment of land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it [from] the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

The court, quoting from the Town of Rocky Mount v. Wenco of Danville, Inc., 256 Va. 316,322 states that:

> "[to] be public, a use must be one in which the terms and manner of which its enjoyment are within the control of

> the governing body. The public interest must dominate any private gain."

If the just stated principles are applied to the facts of this case, the county is condemning the Lacy property for public use and purpose.

In a case similar in many ways to the present case, the Supreme Court in Stewart v. Highway Commissioner. 212 Va. 689, 692 stated that:

> "the test to be applied in this case is well settled. Whether a road sought to be constructed is a public road or one merely for the benefit of a private individual is not tested by the fact that such an individual will receive a greater benefit than the public generally. The test is not the length of the road, or how many actually use it, but how many have the free and unrestricted right in common to use it. It is a public road if it is free in common to all citizens."

In Stewart, the property being condemned was for a road that would only serve one individual.

Considering the facts of this case in light of Ottofaro and Stewart, the taking of the Lacys' property is for a public purpose and use.

I have already ruled that there was no evidence of fraud and that the Board's action was not arbitrary and capricious.

I ask Mr. Slayton to prepare an order consistent with this opinion and circulate it so that it can be returned to me for entry no later than December 9,2005.

Very truly yours,

/s/ William N. Alexander, II
William N. Alexander, II

cc. Mr. Gregory Haley, Esquire
Mr. Henry E. Howell, III, Esquire

COMMONWEALTH OF VIRGINIA

TWENTY-SECOND JUDICIAL CIRCUIT
CIRCUIT COURT OF PITTSYLVANIA COUNTY
CIRCUIT COURT OF FRANKLIN COUNTY
CIRCUIT COURT OF DANVILLE

November 3, 2005

[Entered: November 3, 2005]

Mr. Russell O. Slayton, Jr., Esquire
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Mr. Gregory J. Haley, Esquire
Gentry Locke Rakes & Moore
P.O. Box 40013
Roanoke, Virginia 24022-0013

RE: Halifax County Board of Supervisors v.
D. Epps Lacy and James Lacy
Case # CL05-125

Gentlemen:

I have read and considered all memoranda submitted. The question before me is whether the County's failure to comply with §25.1-206(2)(d)(ii) of the Code of Virginia requiring that a petition for condemnation contain:

> "...a plat, a drawing or plan, in sufficient detail to disclose fairly the nature of such work or improvement including specifications, elevation and grade changes....so as to enable the owner of such property to be reasonably informed of the nature, extent and effect of such taking and the construction and operation of such works and improvements, ..."

deprives this court of subject matter jurisdiction. No case in Virginia has addressed this question directly. The question, then, is whether the County's failure to file a plat with the petition for condemnation is procedural or whether the effect is to deprive the court of subject matter jurisdiction.

I find that the failing to file the plat is procedural in nature and does not deprive this court of subject matter jurisdiction.

Accordingly, the motion to dismiss is denied. The Board's motion to amend is granted. The Board shall have fourteen (14) days from the date of this letter to file an amended petition for condemnation. The respondent shall have fourteen days to file its response.

I ask Mr. Slayton or Mr. Haley to prepare an order and circulate the same so that I can receive it for entry no later than November 16, 2005.

I intend to rule on the public purpose question by the end of next week.

Very truly yours,

/s/ William N. Alexander, II
William N. Alexander, II

VIRGINIA:

IN THE CIRCUIT COURT FOR HALIFAX COUNTY

****

Board of Supervisors of Halifax County, *
Plaintiffs, *
*
v. *
*
D. Epps Lacy and James Lacy, *
Defendants. *
*

****

[Entered: April 12, 2006]

MOTIONS HEARING

On the 12th day of April, 2006, beginning at 9:00 a.m., at Halifax Circuit Court, Halifax, Virginia, the above-entitled matter came on for hearing before William Alexander, and the following proceedings were had.

APPEARANCES

REPRESENTING THE PLAINTIFFS:

Gregory J. Haley, Esquire
Gentry, Locke, Rakes & Moore, L.L.C.
10 Franklin Road, Southeast
Roanoke, Virginia 24022-0013

AND

Russell O. Slayton, Jr., Esquire
Slayton, Bain & Clary, PC
411 South Hicks Street
Lawrenceville, Virginia 23868

REPRESENTING THE DEFENDANTS:

Henry E. Howell, III, Esquire
Waldo & Lyle, P.C
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Kimberly Powers, Court Reporter
434-447-6037

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(The court reporter was sworn)

THE CLERK: The case is Board of Supervisors of Halifax County, Virginia versus Epps Lacy and James Lacy. This is a pretrial conference.

THE COURT: Actually, it's a hearing at which there will be some evidence that will be produced. I think there is a stipulation that we'll put on the record. The first thing, looks like to me, that we ought to get out of the way is the issue on the bona fide offer.

MR. HOWELL: Yes, Your Honor.

THE COURT: Mr. Howell, from what we've discussed, y'all really agree on what the facts are, of course you don't agree on whether there's a bona fide offer. So, why don't we just go ahead and get that out of the way and get the stipulation on the record. Is that agreeable, Mr. Haley?

MR. HALEY: Yes, Your Honor.

MR. HOWELL: And I'll let Mr. Haley do it. If he can fill in the dates for the record, that will be helpful.

THE COURT: Mr. Haley.

MR. HALEY: May I?

THE COURT: Yes, sir.

MR. HALEY: Your Honor, the bona fide offer to purchase letters were mailed on March 16th. We handed you an exhibit which includes all three letters.

THE COURT: For the purpose of this, hearing, is it agreeable just to mark this as the county's Exhibit Number 1?

MR. HOWELL: I haven't seen it, Your Honor.

MR. HALEY: Your Honor, you'll note that--

MR. HOWELL: For identification purposes, absolutely.

THE COURT: For identification purposes, and then we'll admit it.

MR. HALEY: The letters are addressed to the property owners. They're carbon copied to the attorneys for the property owners, and they offer to purchase the property for the amounts in the appraisals, and they include copies of the appraisal, a title report and plat sheets.

Your Honor, based on the other facts that are already in the record about the filing of the engineering drawings, I think that takes care of the stipulation we talked about in chambers, assuming this is admitted.

MR. HOWELL: Your Honor, we don't have an objection to Petitioner's Exhibit 1.

THE COURT: Then that will be admitted as Petitioner's Exhibit Number 1.

(Exhibit Number 1 was marked for identification and received into evidence)

MR. HALEY: The other thing, Your Honor, is the exhibit to the--there's two other exhibits to the petition. One is the engineering plans. They are probably going to be talked about by Mr. Barkley today, but if we can get those admitted now. Then there's the Board of Supervisors resolution, too, if we're just trying to get the record complete.

MR. HOWELL: Your Honor, I think we needed to indicate that the appraisal was based on certain sheets that accompanied the original petition in condemnation that was filed on April 5, 2005, and that the actual engineering drawings and the plans that were done by the engineer for the take were attached to the amended petition for condemnation which was filed in November of 2005. With that understanding, then we can admit those as exhibits.

MR. HALEY: And, Your Honor, that document of record is in the record.

THE COURT: That's stipulated?

MR. HALEY: Yes.

THE COURT: And it's further stipulated, as we talked, I assume, that when the appraisal was made before the original petition was filed, that the appraisal did not have the plat that has now been allowed by way of the amended petition?

MR. HALEY: We had the plat, we did not have the construction drawings.

THE COURT: Okay, construction drawings.

MR. HOWELL: Anyway, he had what he had that's attached to the petition in condemnation, and he did not have what was attached to the amended petition for condemnation.

THE COURT: I think y'all are saying the same thing.

MR. HOWELL: Except I don't know if there's differences between the two until I inquire of the engineer.

MR, HALEY: Your Honor, just to make sure I understand, the survey plat, the engineering drawings, the offer to purchase and the Board of Supervisors resolution are all admitted as evidence.

THE COURT: One through Four. Is that right, Mr. Howell?

MR. HOWELL: Yes, I agree.

(Exhibit Numbers 2, 3, 4 and 5 were marked for identification and received into evidence)

THE COURT: So, that takes care of that stipulation. Now, how do y'all want to proceed, then, with the rest of the hearing?

MR. HOWELL: Well, Your Honor, without waiving our position that the burden is on the petitioner to prove that all the statutory requirements need to be fulfilled before proceeding with the trial on just compensation, I'm happy to assume the responsibility of going forward first.

THE COURT: Is that agreeable with you?

MR. HALEY: I think we have one housekeeping matter, the prior record. Mr Howell saw this order yesterday.

THE COURT: This is the prior record of September 2005 hearing?

MR. HALEY: Yes.

THE COURT: What I'm doing is making the prior record of the evidence taken at that hearing in September part of the evidence on the amended petition.

MR. HOWELL: Yes, Your Honor. Thank you.

THE COURT: All right, Mr. Howell.

MR HOWELL: We call Joe Barkley, please.

THE COURT: Mr. Barkley.

JOE BARKLEY,
called as a witness on behalf of the respondents, having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Good morning, thank you for coming. Please identify yourself one more time for His Honor arid us.

A. My name is Joe Barkley. I'm the residency administrator for the local office, Virginia Department of Transportation, Halifax residency.

Q. How long have you had that position?

A. I have been in this position for about 31 years.

Q. Have you been involved in the process of identifying what's needed for road work on the property of the Lacys there off of Route 614?

A. Yes, sir.

Q. When did you first get involved?

A. I would say the original request was 20 years ago, approximately.

Q. Okay. Well, that's interesting. How were you involved back then?

A. When the land owners requested the road as a rural addition many years ago--

Q. The King family?

A. Yes, sir.

Q. And nothing happened then until--

A. Oh, a lot happened. I think the Board of Supervisors worked with VDOT and worked with the property owners and worked with the King family, and it's been going on for about 20 years.

Q. When did you come up with some--were you involved in coming up with some plans for where the road would go?

A. Over the years, we have staked that section of the road like we do normal rural additions, just put up wood stakes. In the last couple of years, they have gotten more definitive in where they want the road. At that point--

Q. Who is they?

A. The Board of Supervisors. At that point, they proceeded to have it surveyed and designed in the most recent couple years.

Q. Were you involved in that?

A. I was involved in reviewing their plans and showing them our original ideas of where the road would go if we staked it by eye. As they proceeded, their design firm provided us plans, us being VDOT. We reviewed those plans and provided input back to the attorney.

Q. Did you suggest the procedure using the board of viewers to the Board of Supervisors?

A. No, sir. I think they explored all avenues of procedures to add roads to the state system.

Q. Did you talk to them about procedures?

A. Yes, sir. I was on the road viewers as an ad hoc member of the road viewers a few years ago.

Q. Beforehand, did you have discussions with the board and the board's representatives about what procedure to use to take the property?

A. Yes, sir, about the rural addition process, and I guess they pursued the condemnation aspects of that.

Q. Okay. And they chose their procedure?

A. Yes, sir.

Q. Did you have any input on that?

A. I guess. I contacted our right-of-way office to find out the VDOT policies for condemnation and I believe I provided that to the county, the sections that we use for normal highway projects.

Q. Did they use those?

A. I don't think it's the same.

Q. Now, you mentioned the rural addition program.

A. Yes, sir

Q. Tell me what you explained to the county as to the rural additions programs that they had available.

A. The rural addition program is the Board of Supervisors are empowered since 1932 to manage the secondary road system and to add roads to the secondary road system since 1932 the Byrd Act. I can't quote the section, but I think it's 33.1-221 9 empowers the Board of Supervisors for that.

Q. Let me hand you a section of the code and see if that helps you.

MR. HALEY: Your Honor, we'd only like to point out that this evidence was also presented back in September, and it's cumulative and redundant.

THE COURT: Mr. Howell, I believe this was presented about the board of review.

MR. HOWELL: Yeah, and the problem is I couldn't--I wasn't really prepared at that time, and I'm not certain what he said last time, Your Honor. It's a little confusing whether we're going on the streets or the board of viewers, and he wouldn't commit one way or another on that.

THE COURT: Just ask him about that and let's just clear that up because what he said was they were looking at the board of review and then they decided to go to condemnation.

MR. HOWELL: And I didn't have a code section for him to review last time, so he kept saying, I'm not certain.

THE COURT: We'll clear that up.

MR HOWELL: So, that's why I brought two copies this time.

THE WITNESS: And I can't quote that section.

THE COURT: There are only two sections to talk about.

BY MR. HOWELL:

Q. It's 33.1-229, I believe is the section you're referring to. Do you have 229?

A. I'm getting that way. 33.1-229. This section is the one that is entitled, Establishment, alteration and discontinuance. The local authorities-

THE COURT: Is that what you're talking about?

BY MR. HOWELL:

Q. I want to make sure that's what you're talking about. Okay, so tell me about the rural addition funds under this section that you told the county about.

A. This is the section that just empowers the board, this just gives them the authority to add roads. 33 1-72.1 is the section that the road can be added under.

MR. HALEY: Your Honor, we would object to this testimony because the issue of funding is a collateral matter for this Court. The road is for a public purpose and how the Board of Supervisors ultimately funds it, it doesn't go to the condemnation.

THE COURT: I think you're right, but I think Mr. Howell is about through with this.

MR. HOWELL: That's right.

BY MR. HOWELL:

Q. We're at 72.1?

A. Yes, on Page 48. I think the key part, as I read it and as I've checked with our main office in Richmond to verify since I knew I was coming to court today, a street as used in this section means a street or highway shown on a plat which was recorded or otherwise open to the public use prior to July 1st, '85, at which time it was open to and used by motor vehicles and has not been taken through. I think the key word here is, A street which was shown on a plat which was recorded or otherwise open to public use, and this road was open to public use prior to '85.

Q. All right. I only got one question on that section and it has to do with when VDOT assumes the road. It has language in there about developers or successors developers have to give up all their interest in the road in order for VDOT to accept it for maintenance and construction. What does that language mean?

A. Well, for us to take over streets, we have to have a 40-foot dedicated right-of-way, and I guess that's why we're here today because we couldn't get that from the land owners.

Q. What is that language about, Developers have to give up all their interest?

A. Where is that part; way over in there?

Q. Yeah. Such streets are eligible under this provision--I'm reading from Paragraph C. Such streets are eligible under this provision only if neither the original developer, developers or successor developers retained any speculative ownership or partnership in two or more parcels or equivalent frontage abutting such streets. Well, it says, Two or more parcels or equivalent frontage abutting such streets shall constitute speculative interest.

So, it says the only way the streets become eligible to come under 72.1 is if the developer, developers or successor developers retain no speculative interest.

A. I think that's talking about the first section where it talks about a street or highway on the plat. I think that's talking about subdivisions.

Q. Okay. That's your position?

A. Yes, sir.

Q. And that's what you shared with the county?

A. Yes, sir.

MR. HOWELL: Thank you. Now, I just need--I'm not certain how we numbered the sheets that were attached with the petition versus the engineering plan sheets that came with the amended.

THE COURT: We really hadn't numbered them because we just stated them in the record. We ought to get those together. Do y'all have copies now?

MR. HALEY: No, sir. They're oversized things.

MR. HOWELL: They're the ones in the file, so I don't think we need to duplicate a copy. We've agreed that we got what was attached to the petition, meaning the property owners, and we got what came with the amended petition and they are what's in the Court's file. So, are you marking that?

THE CLERK: I will mark the way y'all want them marked.

THE COURT: Do we need to wait, or can you go ahead?

MR. HOWELL: I guess what I can do is have Mr. Barkley take a look at the engineering plan sheets, and then we can get the little ones back because I have to pull them out of my file,

MR. HOWELL: Greg, I'm going to defer to you on how you want them numbered except we did mark the series of letters and offers as 1.

MR. HALEY: I'm going to mark them in the same order they're in the amended petition.

MR. HOWELL: Okay.

MR. HALEY: They are only like a week apart.

MR. HOWELL: I just want to know which came with the amended petition.

MR. HALEY: The thin one.

MR. HOWELL: So, Number 5, Your Honor, just so we're clear, came with the amended petition. I guess we need to figure out, Your Honor, or have some evidence--I didn't know they came separately--when Exhibit 4, the thicker one, came,

MR. HALEY: It's in the record, there's a transmittal letter. We talked about it in chambers and we talked about it in telephone conference, we didn't have it all the way finished.

THE COURT: Number 4 also came after the amended petition?

MR. HALEY: No, no. Well, the Court entered an order saying, File an amended petition by such and such a date. We didn't have all the elevations drawings done by that date, there being work done, so we had a telephone conference and said, File the one you've got and file the other one when it's done.

THE COURT: The one Mr. Howell has in his hand is the one that was originally filed?

MR. HALEY: With the amended petition, and there's a subsequent one.

MR. HOWELL: No, Your Honor. Just we're clear to know this, Five, which is the thin one, that does not have certain pages that are--Five came with the amended petition, and Four was later filed after the amended petition was filed.

THE COURT: That's correct, Mr. Haley, right?

MR. HALEY: Yes, sir. And that was discussed with the Court and approved by the Court.

MR. HOWELL: I don't remember that, but the record will reflect it, whatever it is

THE COURT: I think there's a letter in there, I'm not sure. I remember we had a call, and I do know it was not complete when the amended petition was filed. We should have five exhibits.

MR. HOWELL: And I need to look at Two, if I may, which are those little plan sheets that came with the initial--I've got them, I'm sorry.

THE COURT: Has that been marked?

MR. HOWELL: It's been marked Two, Your Honor.

BY MR. HOWELL:

Q. All right. I'm going to ask, if I may, give you what's been marked and take back what I handed you earlier, Mr. Barkley. We're handing you, if I may, and work where you want, but I ask if

you've seen Plaintiff's Exhibit 2 before? You can hold it.

A. I don't know if I've seen this small print. Might have, but I've seen these big ones.

Q. Have you seen a larger version of Two?

A. I would think so. I've got files. I've got a lot of files at the office I could verify.

Q. You don't remember seeing Two at any point?

MR. HALEY: Your Honor, I think he just answered that he thought he had.

BY MR. HOWELL:

Q. Let me know. Take your time looking at it because I need a clear answer on this, Mr. Barkley. If you don't know, that's fine. If you do know, if you're uncertain, whatever you want to say.

A. As much as I've studied this project, I feel sure if there was anything I needed to see, the county provided it and I saw it. So, without checking my files to say I've got one of these in my files or I've seen it, I can't answer that.

Q. So, as you sit here, you do not know if you've seen that before; is that a fair statement?

MR. HALEY: Your Honor, that's a mischaracterization. We object.

BY MR. HOWELL:

Q. Let me ask you this, Mr. Barkley. Tell me everything you know about that sheet right there, Plaintiff's Exhibit 2, as you sit there on the stand; when you got it, when you saw it before, anything you know about it

A. It looks like the alignment that we've been looking at ever since they started the survey work by Mr. Brady.

Q. That's what it looks like?

A. Yes, sir.

Q. Okay.

A. But I can't answer that without comparing it to my files.

Q. Okay. And you didn't bring them today?

A. I didn't bring all of them. I've got, like, six files.

Q. Do you have them with you?

A. I have two of the six.

Q. Do you think you might have that in the files?

A. It's possible.

MR. HOWELL: Do you mind taking time, Your Honor? May we take time to see if he's got that?

MR. HALEY: Your Honor, relevance issue.

THE COURT: I'll give him time to look, but let's go on.

BY MR. HOWELL:

Q. Now, you say you have seen Four and Five?

A. Yes, sir.

Q. When did you see Four?

A. Well, we've been working on this for over a year or so on these plans.

Q. Let's look at Four; if I may have you look at Four first. First off, can you give us the date on Four.

A. The date that the P.E. signed it was 11/05.

Q. 11/05. Now, if you will tell us, what is Four?

A. Four is the survey with the grade line and the attached cross sections.

Q. All right.

A. That's the survey of the take that they want to give the 40 feet to VDOT and the cross sections that the designer developed.

Q. Did you work with the designer in coming up with that plan, or your office?

A. Yes. We talked to Joyce Engineering and talked to them about the design.

Q. Did you tell them what you need?

A. We told them we needed cross sections

Q. And the width?

A. And the width and the alignment, then the vertical and horizontal; by alignment, vertical and horizontal alignment.

Q. Let me ask you if you would take a look at Five. What's the date on Five?

A. This is earlier. November 15, '05.

Q. This says--

A. November 29th.

Q. What are you looking at when you say 2 9th? Oh, I see; where she signed off on it, right in blue ink on the right column. In the same place on Number 5 you've got what date?

A. November 15th.

Q. November 15th. Tell me, have you seen that before?

A. Yes, I've seen this.

Q. What is that?

A. This is the plan with alignment only and a grade line, but no cross sections.

Q. What are cross sections?

A. Cross sections are to show--I'11 use this piece of paper here as an example A cross section is to show, just like a CAT scan or anything else, is to show a slice of what the road would look like from an end view. So, it shows where the road would be, where the slopes would be and where the right of way would be.

Q. What do you learn from those cuts--is that what you called them—that's in Number 4 versus what you learn from Number 5 that doesn't have cuts?

A. You learn how wide the area of land will be impacted with the design from the grade of the road, from the existing elevations of the road and

the depth of the cut or fill. So, you can determine how wide of an impact you're going to have, and also which way the drainage is going. So, with this plan, you didn't have that, and with this plan, you do have the cross sections

Q. And when you say this and this, you first were referring to Five, just so we got the record straight, which is the one without the cuts versus Four with the cuts?

A. And fills.

Q. Cuts and fills?

A. Right.

Q. Now, I want to know, if you can, and maybe you can't, is there any difference in the area of take shown on Plaintiff's Exhibit 2 that was filed with the petition in condemnation versus what's in Plaintiff's Exhibit 5 that was filed with the amended petition as for the take area?

A. I can't answer that because I haven't, compared if the curves are the same. This one only shows a plat. This one only shows a plat.

Q. And you're holding up Two?

A. I'm holding up Two. This doesn't have the grade line shown as Four does, and Five has the grade line. Four, which I would have thought would have been Five, but anyway, Four shows the grade

line and the cross sections, and this is, if I had to categorize this, this is a plat.

Q. Two is a plat?

A. Two is a plat, Five is a drawing with alignment and a grade line, and Four is the total package of the right-of-way take, the grade line and the cross sections.

Q. Showing cut and fill?

A. Yes.

Q. Now, Two. You're unable to say whether Two is the plat, what do you mean by plat?

A. Just a drawing of the property and of where they want the road to go, the alignment of the road, proposed 40-foot right-of-way.

Q. And are you able, as you sit there today, to say whether what's shown in Two for the take on the plat, Exhibit 2, is the same as what's shown on the take on Four and Five?

A. No.

Q. You can not?

A. No. I mean, I could eventually, but I can't just looking at them.

MR. HOWELL: Okay. Now, Your Honor, I think we can do cross-examination, or he can go see if he's got that in the file

THE COURT: Let's let him do cross-examination and then let him look in the file.

CROSS-EXAMINATION

BY MR. HALEY:

Q. Mr Barkley, you staked out the original alignment, did you not?

A. 20 some years ago. Over the years we have staked it several times.

Q. But did you stake it for the purposes of this condemnation proceeding?

A. Yes, sir.

Q. So, you staked out a 40-foot right-of-way for the purpose of this condemnation proceeding?

A. We gave I think just general stakes, wooden stakes by hand. We did not survey it. I think your engineering firm surveyed it.

Q. And didn't you work with the engineers in the survey process; weren't you in communication with them?

A. Yes, sir.

Q. And was it your understanding that the plat that is Exhibit 2 is the survey that resulted from your staking out and your work with the survey company to the area taken?

A. Yes, sir.

MR. HOWELL: Your Honor, I object. He said he doesn't know about Exhibit 2 without checking the file.

THE COURT: Objection overruled. He can answer that question. He's looked at Number 2.

MR. HOWELL: All right.

THE COURT: He's looked at it this morning. Even though he may or may not have a copy, but he's looked at it this morning.

If you have any questions, Mr. Barkley, you can look at Number 2 to compare it.

BY MR. HALEY:

A. I think it generally looks like the same one, but without checking the alignment and the curves and everything, I can't say it's the exact footprint of these big drawings. That was the intent.

Q. Let me ask it this way. Based on everything you know, is the survey plat that is

Exhibit 2 consistent with the right-of-way you staked out for this road?

A. Just looking at it, I would say yes, sir.

Q. And is it consistent with everything you know, that the engineering plans in Exhibit 4 and 5 followed that exact same alignment?

A. Yes, sir, that was the intent.

Q. Has anyone ever suggested to you that there is any additional property in Exhibit 4 or 5 that is not covered by Exhibit 2?

MR. HOWELL: Objection, hearsay.

THE COURT: That is hearsay.

MR. HALEY: Let me rephrase.

BY MR. HALEY:

Q. Are you aware of any facts that suggest in any way there is any difference in the property taken as shown in the survey plat Exhibit 2 or in the engineering drawings Exhibits 4 and 5?

A. No, sir.

Q. To the best of your knowledge, is Exhibit 2 completely consistent with the area of take shown in Exhibits 4 and 5?

A. Yes, sir.

Q. And if you have an opportunity to review your files that you brought with you today, would you expect that review would establish exactly that?

A. Yes, sir. We're going to find out here in a minute, I guess

Q. Now, you worked with the Board of Supervisors throughout this process, did you not?

A. Yes, sir.

Q. And in fact, you provided them with a resolution to reserve funding under the rural addition program for this project?

A. Yes, sir.

Q. And they adopted that resolution?

A. Yes, sir.

Q. And VDOT set aside that funding; it's reserved?

A. I'll clarify that, if I may.

Q. Please.

A. In April of '05, the Board of Supervisors passed a resolution to request this road be added to the state secondary system contingent upon the

right-of-way being provided. I processed that request from the Board of Supervisors with our local assistance office in Richmond. It was approved, it's been given a route number, and it is contingent upon the right-of-way being provided.

Q. And funding is reserved as well?

A. Funding is allocated in the secondary improvement program funds under a county-wide allocation for rural additions. That account, as of today, has $302,000 in that account. July 1st, the plan is to allocate $45,000 more to that account.

Q. And it is VDOT's intention that once that right-of-way is available, to use that money to upgrade this road?

A. Yes, sir.

Q. Now, VDOT also prepared a state environmental review for this project?

A. Yes, sir.

Q. And that has been approved as well?

A. Yes, sir.

Q. And VDOT has reviewed the plans in Exhibit 4 and 5 and approved them, have they not?

A. Yes, sir. I believe you have a letter on file that when I got these plans, it was around Christmas time, I believe. I provided them to our L

& D, location and design, engineer's office in Lynchburg and asked for a review to make sure that it would meet our standards, and I provided you a certification to that.

Q. And there are no temporary construction easements shown in those plans, are there?

A. No, sir.

Q. And VDOT believes, based on what is known today, that they can build within that right-of-way?

A. Yes, sir.

Q. And now that road, state Route 95 9, is going to serve more than three houses?

A. Yes, sir.

Q. And it's served more than three houses since time and memorial?

A. Well, I wouldn't say that.

THE COURT: Mr. Haley, you're getting back into the evidence of the hearing.

MR. HOWELL: I want a separation of church and state here. No reference to the Bible, please.

BY MR. HALEY:

Q. And state Route 959, the road that exists now, has served more than three houses since the 25 years you've been involved; is that correct?

A. Yes, sir.

Q. And that road is as open to the public as any private road is to serve those homes, is it not?

A. I'm not in a position to answer that.

Q. But to your knowledge, any member of the public who wants to go down to King's Village can drive down that road and go to those homes?

MR. HOWELL: Objection, Your Honor. He said he's not in a position to know.

BY MR. HALEY:

Q. To the best of your knowledge?

A. To the best of my knowledge.

THE COURT: Plus we already heard all the evidence on that. We don't need to hear that any more.

BY MR. HALEY:

Q. Now, if VDOT funding was not available for any reason, the Board of Supervisors

would have alternative funding choices, would they not?

A. Yes, sir.

MR. HALEY: Your Honor, we'd ask that Mr. Barkley be given a few minutes to look at his file to see if there's anything inconsistent in his file with what--

THE COURT: Any objection?

MR. HOWELL: No objection.

THE COURT: Mr. Barkley, we'll let you review your files and we'll continue. Where are your files?

THE WITNESS: Your Honor, I only brought two of about six files, so I might look at these two and what y'all want me to find might not be in those two. My office is ten minutes away, I can bring all of the files, if you want me to.

THE COURT: Just do what you're comfortable with. If you can, in a reasonable time, go look at all your files so we can get it taken care of now.

BY MR. HALEY:

Q. Before you leave, just so there is no mistake, based on your decades of experience with VDOT and your familiarity with this project and this road, based on your knowledge, what is in Exhibit 2

reflects the survey plat that you staked out, and what is in Exhibits 4 and 5 reflects the exact same dirt?

A. Yes, sir.

MR. HALEY: Thank you.

THE COURT: Now, the only question we're going to have is what happens when he reviews his file? So, we're through with you, except that.

MR. HOWELL: They opened the door for a couple of new matters, Your Honor.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Now, I just want to be clear. This local assistance fund for county-wide, that's $302,000, and July 1, we'll have an additional 45,000 for a total of 347,000?

A. Yes, sir.

Q. VDOT can use that for any road in the county, assuming that the procedures are followed for rural addition funds devotion to some improvement; is that correct?

A. I think I would probably word that that the Board of Supervisors has the authority to use that road money on rural additions up to a cap. There's a limit of how much you can use on rural additions or other improvements to the secondary system. So, our cooperation with the Board of Supervisors is a joint venture. So, the Board of Supervisors is the ultimate decider upon the allocation of the funds.

Q. Were you involved--the issue of temporary construction easements came up in cross-examination. Have you been involved in deciding with the design group whether there was temporary construction easements needed to complete this project?

A. I would answer that by saying our design section, in my letter to Mr. Slayton, stated that we feel confident we can build it within the right-of-way. However, as you build roads, sometimes you run into unforeseen problems and you might need to get construction easements wider or drainage easements that you didn't anticipate, even though you've designed it. You just run into unforeseen problems. We stipulated to them that if that was necessary, that we would come back to the county and request the necessary easements to finish building the road.

Q. Based on your experience all these years with VDOT, this type of road project, have you seen one similar to it before?

A. Yes, sir. We just finished two in the last two years.

Q. How many of those had no temporary construction easements?

A. Well, let me answer that by saying most of the time when you are building a rural addition road, you're building it to people who want the road, so they don't draw a line. If you need to lay the slope back to help their property some and you need some more dirt, you just do that.

In this case, that's not the situation. We're going to be building in a strict 40 feet, and if you need to lay the slope back or widen the fill out a little bit, we are aware that we got to stay within the exact 40. So, we've never been restricted that much. And even on major projects as the John Randolph or 651, if you run into a construction problem, we would go, in a VDOT job, we would go back to our right-of-way people and say, Look, the right-of-way is too narrow here, you need to contact the property owner and secure an additional easement.

So, I don' t think VDOT can say that we don' t need wider locations along this road as we get into it, You know, it might be that we just need them, and if so, I've told the county we would come back to them and say, We need an additional easement here. So, does that help answer your question?

Q. Let me rephrase it. In the other projects, can you remember an example where you worked totally within the 40-foot right-of-way

without going over at all or going off the drainage areas at all?

A. I think we've done some within and some without over the years.

Q. Do you have an example of working totally within the right-of-way area? Let me ask you this. Can you remember a project where there wasn't a temporary construction easement granted?

THE COURT: What was that?

MR. HALEY: Objection, asked and answered. He's asking the same question over and over again because he doesn't like the answer.

THE COURT: I think he's answered the question, Mr. Howell.

MR HOWELL: He said, I don't think I can answer it, then he went on and on and on

THE COURT: You're asking if he can remember any particular one? He can answer that.

BY MR HOWELL:

Q. That you worked entirely within the right-of-way.

A. When we build roads that are not surveyed for rural--

MR. HOWELL: Objection, Your Honor. I respectfully--I know he's mine, but I think that's a yes or no and then an explanation.

THE COURT: It's a yes or no. If you can remember, it's fine; if you can't remember, it's fine.

BY MR. HOWELL:

A. I can't remember.

MR. HOWELL: All right, Your Honor.

MR. HALEY: Refollow-up, Your Honor. It will be brief.

RECROSS-EXAMINATION

BY MR. HALEY:

Q. Mr. Barkley, can you identify that document for us? Let me make the record complete. What I've handed you is a document on Halifax County Board of Supervisors letterhead entitled, Resolution, dated February 7, 2005. Can you identify that for us?

A. This is the one we referred to a minute ago. This is the board passed a resolution requesting us to take the road.

Q. Is this the resolution you referred to in your prior testimony?

A. Yes, sir.

Q. And when you were saying the Board of Supervisors has the power to ask VDOT where to spend the rural addition funding, in this the resolution that accomplishes that?

A. Yes, sir.

THE COURT: That will be marked as Number 6. Any objection, Mr. Howell?

MR. HOWELL: No, Your Honor.

THE COURT: That will be admitted as Number 6.

(Exhibit Number 6 was marked for identification and received into evidence)

BY MR. HALEY:

Q. Now, when you got Exhibits 4 and 5, you sent those off for review and you talked to the review folks and you talked to the engineer who did those plans?

A. Yes, sir.

Q. Based on everything you know now, VDOT can build within that strict 40 feet?

MR. HOWELL: We're going over--

THE COURT: He's already testified to that.

BY MR. HALEY:

Q. When you, in responding to Mr. Howell, when you said, If unforeseen circumstances, that could come up with any project at any time?

A. Yes, sir.

MR. HALEY: Thank you.

THE COURT: Thank you, sir Would you go review your files?

THE WITNESS: Yes, sir.

THE COURT: Mr. Barkley, take as much time as you want, but very expeditiously.

Is that it?

MR. HOWELL: Once we get him on that, there may be some examination on that, we'll see, but I'm not going to call any other witness, Your Honor,

THE COURT: Mr. Haley, I think we got everything as far as you need, too?

MR. HALEY: Yes, sir.

THE COURT: So, the housekeeping matter is this. After we get Mr. Barkley straight, then on May 4th, we got the trial?

MR. HALEY: May 8th.

THE COURT: May 8th. We got the trial scheduled for May 8th and 9th. Hopefully we'll have some resolution of the amount of the award, amount of what's going to be paid. Of course if we don't, then we're going to try the case. Let's take a brief recess and wait for Mr. Barkley. As soon as he gets back, then we'11 finish.

(A brief recess was taken)

THE COURT: All right, Mr. Howell.

MR HOWELL: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Barkley, you found something in your file?

A. Yes, sir, I found it in my file. As I said earlier, I didn't have a small copy, but I found this large copy.

Q. What's the date on that?

A. The date received in my office is June of '04.

Q. And who prepared that?

A. I don't think it has who prepared it on it. It's not signed.

Q. Do you know who sent it to you?

A. I'm sure the county sent it to me; Mr. Slayton.

Q. All right. So, you had this in your file. Now, when I look at that--do you have an extra copy of it?

A. No, sir. This is the only one, but you're welcome to look at it. I was going to show you--

THE COURT: Do you want to mark that?

THE WITNESS: I don't mind if y'all do that.

THE COURT: What we can do is make a copy. Any objection to doing it that way, Mr. Haley?

MR. HALEY. No, sir.

MR. HOWELL: I guess we need to mark that as Respondent's--just make it Exhibit 7. That's great, joint even.

(Exhibit Number 7 was marked for identification)

BY MR. HOWELL:

Q. Now, we marked as Plaintiff's Exhibit 7, what is that?

A. This is a plat of the same roadway. I've just looked at each page comparing them to this

Exhibit 2, and all the pages match up, and the property lines are shown at the right station numbers, and the buildings are shown at the right spots on both, and the station numbers are the same.

MR. HOWELL: Thank you. We can probably do an exhibit. I move Number 7 in, Your Honor.

THE COURT: Will be admitted.

(Exhibit Number 7 was received into evidence)

BY MR. HOWELL:

Q. Now, having clarified that, now we can go back to Two. Have you compared Two, which designates, the same area for take as Number 7, what you got in your file, have you compared Two now with Four and Five?

A. I will. I haven't, but I will.

Q. Let me ask you this. Had you taken time before to compare Exhibit 7 with Four and Five?

A. Before right now, no, sir

Q. Okay. Well, can you take a few minutes to do that.

THE COURT: If Two and Seven are the same, then.

MR. HOWELL: Well, they're not the same, Your Honor. Your Honor, they're not the same. He said they're the same area, but they frankly look a little bit different.

BY MR. HOWELL:

A. I think so.

Q. So, have you looked at each page? I guess you're looking at Five now?

A. I'm looking at the property lines and the buildings to see if the station numbers are the same. They're different scales, that would be the first thing I said. There's a different scale on this plan and that plan and this plan; different design scales.

Q. Do you know what the difference is?

A. This is an inch to 50, but it's a reduced inch to 50. It's reduced, so an inch to 50 on a regular. It's reduced.

Q. So, it may not match up exactly is what you're saying?

A. It matches up, but to look at it, it looks different because it's a different proportion. This is a 50 percent size drawing, and this is a 100 percent size.

THE COURT: So, if you blew that one up, it would be the same as that one?

THE WITNESS: Yes, sir.

BY MR. HOWELL;

Q. What's the scale on Five?

A. This is--

Q. It doesn't have the graphic scale up under the compass?

A. One to 50; one inch to 50. The difference in this drawing and this drawing--

Q. The difference between Two and Seven is what?

A. This is Seven and this is Two. This is a reduced version, and plus this has a lot more survey information.

THE COURT: Talking about Two?

BY MR. HOWELL:

Q. Two?

A. Two has more survey information with alignment and numbers. As you can see, this doesn't have all the survey information.

Q. So, now we're looking at Five and Two?

A. Right. So, Five and Two, this property line that goes across the first, this matches here.

The station's at seven plus some, between seven and eight, and that's where this property line was.

The next property line is on the next sheet and that's right here at 13 plus which is approximately right where that property line is right there.

The next designated spot would be this property line at 21 which would be this property line as shown here at 21.

Q. Let me ask you this while you're doing that. The survey information that's on Two, which you say shows the alignment better--

A. Yes.

Q. --Are you able to compare that alignment that's designated by the survey information with Two with whatever data may be on Five?

A. It's not on this one.

Q. Not on Five?

A. That same alignment is not on Five.

Q. How would you go about confirming that what's on Two is the same as on Five if you do not have the alignment survey information on Five?

A. I would look at the amount of the buildings and that the property lines are lining up.

And then to get down into the specifics, I would get the surveyor to verify it when he surveyed it or the designer to actually compute that they are one in the same, but this is all matching up.

Q. It's matching up in terms of stations and property lines?

A. And buildings.

Q. And buildings?

A. And buildings.

Q. And the other thing as far as where the road is based on the alignment, you don't have enough data on Five to confirm it's the same as on Two without going to the surveyor?

A. It looks the same. I mean, they don't have the survey north 84 west and so forth.

Q. Let's go on to the next property line there on Page Two. What's that?

A. The next property line?

Q. Oh, that's a station there.

A. That is a match line. Then down at the barn is a tenant house and the bulk barn. That shows as buck barn, but it's a bulk barn. And then the next property line here is at, looks like 34.

Q. What page is that from Two?

A. That's this property line right here.

Q. On Page 3 of 2?

A. And Page 4 of 5 of this one.

Q. 4 of 5 on that one?

A. Right. It's different pages because it's reduced.

Q. And they look the same?

A. They look the same.

Q. But to verify the alignment, just so I'm clear, you'd have to get the surveyor and designer to match them up?

A. Right. Whenever we did this, I wouldn't go out there and build this road without the right-of-way being marked. The surveyor would actually mark it in the road and we would build to that to make sure we built it where it's designed.

MR. HOWELL: Thank you.

RECROSS-EXAMINATION

BY MR. HALEY:

Q. Mr. Barkley, I'll be very brief, I hope. The difference in scale, it's only size, it has no contact difference, right?

A. Yes, sir.

Q. Based on everything you have looked at and based on all of your work on the project from Day 1, does the area of the take specified in Exhibit 2, Exhibit 7, Exhibit 4 and Exhibit 5 all match perfectly?

A. Yes, sir.

MR. HALEY: Thank you.

THE COURT: Mr. Barkley, thank you, sir.

MR. HOWELL: One other follow-up.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. When you say match perfectly, are you retracting what you said about confirming with the surveyor and designer?

A. No, sir. I would still--whatever happens here, VDOT will say, Stake this right-of-way and we build in what you stake.

THE COURT: Thank you, Mr. Barkley. Nice to see you again. Mr. Barkley, do you need the original you've given us?

THE WITNESS: It's part of this project and y'all can have it.

THE COURT: Okay. Thank you, sir.

MR. HOWELL: Your Honor, we have no other evidence to fulfill our duty of going forward, which I assume.

THE COURT: All right, sir.

Any evidence, Mr. Haley?

MR. HALEY: Judge, can we have five minutes? I don't think we have anything further.

(A brief recess was taken)

THE COURT: Mr. Howell, anything you would like to say?

There is no evidence, right?

MR. HALEY: No, sir.

MR. HOWELL: Yes, Your Honor. We're going to rely on our pretrial memorandum, but I would like to point out two things that I think were significant that happened here today. One is that the cut and fill sheets that Mr. Barkley indicated would show the impact on the property was not included with the amended petition, and it's obvious those are the design sheets and they're going to be used for the project.

Based on Mr. Barkley's evidence that it's needed to demonstrate the impact, I would suggest, Your Honor, that the statute we visited before

amending--you granted leave to amend to add what turns out to be Four or Five, we do not have the cut and fill drawings--was not complete because they essentially have admitted by filing after the amended petition that you needed cut and fill, and he said you needed that to demonstrate, the impact on the land. The appraiser never had it.

THE COURT: Mr. Howell, didn't he say, though, that it was staying within the 40-foot right-of-way and the only way that they could change anything would be to go back?

MR. HOWELL: Yeah, but that's on the temporary easement issue. I'm talking about the cut and fill, the cut and fill that was not filed with the amended petition but was filed later that he said indicated the impact on the land by showing where the drainage would go and how deep it is, so, you know, can we get these tractors across the road? It's farm land. You're not going to know if you can get across the road until you see the cuts and fills that were not filed with the amended petition, but obviously is a part of the designs and drawings that were generated as a part of this project.

Then they rush to the courthouse again and they don't get it right, much put aside the issue that the appraiser never saw it, and Mr. Barkley said to understand the impact on the land, you've got to have it. So, an appraisal based on the take is what's required. They didn't do a new appraisal based on what was finally identified as the project. I mean, darn, you've got to know how deep those culverts are, the drainage culverts on the side of the road.

THE COURT: I guess I'm having trouble following. What difference does it make as long as they're going to be within the 40 feet? I mean, if it's a cut and fill, the wall's within 40 feet, what difference does it make?

MR. HOWELL: The impact on the land. You've got to know the damage to the residue, you've got to appraise the damage.

THE COURT: Okay, but you've got a cut.

MR. HOWELL: You ought to see these cuts and fills. They're deep.

THE COURT: You got a deep cut.

MR. HOWELL: And you never knew that on what they filed.

THE COURT: What they're saying is, as I understand, they don't need any more easements, even with the cuts they've got.

MR. HOWELL: But the drawings, Your Honor, that are required to be filed--they say drawings and plans are required--you say it's procedural, that's fine. We argue it's substantive jurisdictional, but they didn't get it right the second time.

THE COURT: Okay.

MR. HOWELL: And so if you accept that, procedurally they've got to amend to include the ones

with the cuts and fills. Then we get to the issue of whether it's a bona fide offer based on a bona fide appraisal if the appraiser never saw the cut and fill to determine the damage to the residue of whether you can get across this road with your tractor.

That's it, Your Honor. You know I get excited, but I want to make sure I'm clear. That's it. And of course, we rely on the briefs and what have you and the points, but that's from just argument based on what came out today. Those are the highlights I wanted to have the Court consider

THE COURT: All right. Thank you, sir. Mr. Haley.

MR. HALEY: Your Honor, the engineering drawings were filed with the Court, they've been admitted into evidence, they've been used as the basis of the property owner's appraisal. They've had it, it was discussed with the Court, by my recollection. These engineering drawings take time to do, and it was done as quickly as humanly possible by the engineers.

There is no requirement that an appraisal precede the offer to purchase. The offer to purchase merely has to be in good-faith basis. The statute says if there has been an appraisal, it must accompany the offer which was done in this case. In terms of the appraisal that was done, that was done on this take and the appraisal the county has shows a substantial enhancement to the residue because it will be frontage and will be subject to being subdivided. I think the evidence is uncontroverted

today by Mr. Barkley that there is no additional property being taken that wasn't identified in Exhibit 2. If the Court believes--

THE COURT: What's your response to Mr. Howell about the cut and fill and about the possible damage to the residue of the property?

MR. HALEY: The appraisers have looked at it, they disagree. We haven't seen their appraisal report, but Mr. Smith has looked at it and says there is no elevation changes that affects anything in the appraisal. That's going to be something at the compensation hearing the appraisers can argue about, but you've got to remember, the road follows the existing topography.

There is some changes, but this is going to be a gravel road and it's not going to have big, deep ditches. There will be some places where there are some grade changes, and there's some places where there's grade changes now, and the appraisers can argue about that until the cows come home. If there is any necessity that the Court deems necessary, we'd ask that the Exhibit 4, the second plan, be accepted by the Court. It's already been admitted into evidence. That's all we have.

MR. HOWELL: Just one factual error. Mr. Smith, their appraiser, did not have the cut and fill when they did the appraisal. We stipulated that.

MR. HALEY: But he has looked at it since then and he said it doesn't change anything.

MR. HOWELL: That's not in evidence, Your Honor.

THE COURT: The evidence is what it is now. We've talked about this before, too, in various telephone conferences. Now that the additional evidence is in, I still don't see that the Court ought to change its prior ruling. Mr. Howell, I agree with Mr. Haley that it's a question now of the amount to be determined, and it seems like to me if the cuts and fills do affect the rest of the property, which it very well may, then that's the question that the Commissioner is going to have to decide.

So, with all the evidence now before the Court, we'll go forward. I think the prior rulings are correct. We'll go forward with the case, and hopefully we will resolve the remaining amount, and then y'all can go forward with an appeal.

MR. HOWELL: Yes, sir. You're overruling all our defenses to the amended petition?

THE COURT: Yes, overruling all of your motions in the proceedings.

Thank y'all very much. It's an interesting case, and we'll see. Mr. Haley and Mr. Slayton, the two of you have got some work you need to do.

MR. HALEY: Yes, sir, we understand that.

(The hearing was thereby concluded)

THE STATE OF VIRGINIA)
)
THE COUNTY OF MECKLENBURG)

I, Kimberly Powers, a notary public for the State of Virginia at large, hereby certify that the foregoing pages comprise a true, complete and correct transcript of the proceedings; and that the matter was taken down in machine shorthand by me and thereafter reduced to type by me to the best of my ability.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel; nor do I have any interest in the outcome or events of the action.

WITNESS MY HAND, this 12th day of April, 2006.

My Commission Expires November 30, 2009.

/s/ Kimberly Powers
Kimberly Powers, Court Reporter

Kimberly Powers, Court Reporter
434-447-6037

VIRGINIA: IN THE CIRCUIT COURT OF HALIFAX COUNTY

BOARD OF SUPERVISORS OF
HALIFAX COUNTY, VIRGINIA,

Petitioner,

v. At Law No.:CL05-125

D. EPPS LACY

and

JAMES LACY,

and (as to both Respondents)

2.50 acres in fee simple, situated in Halifax County, Virginia, and more fully described in this Petition for Condemnation,

and (as to both Respondents)

.29 acres in fee simple, situated in Halifax County, Virginia, and more fully described in this Petition for Condemnation,

and (as to D. Epps Lacy only)

.39 acres in fee simple, situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation,

Respondents.

[Entered: November 29, 2005]

ANSWER AND GROUNDS OF DEFENSE TO AMENDED PETITION FOR CONDEMNATION

NOW COME the Respondents, D. Epps Lacy and James Lacy, by counsel, and as and for their Answer to the Amended Petition for Condemnation filed herein do hereby state as follows:

1. As to paragraph One of the Petition, the Respondents admit only that the Petitioner is authorized to take property by the power of eminent domain for a constitutionally permissible public use. The Respondents deny any allegations that purport that the taking in this case is for a constitutionally permissible public use.

2. As to paragraph Two of the Petition, the Respondents admit only that they are the owners of the property the Petitioner seeks to take and that a plat was attached to the Amended Petition as Exhibit A, but the Respondents are without sufficient information to admit or deny the accuracy of the contents and information contained in the plat and call for strict proof thereof. The Respondents are without sufficient information to admit or deny the remaining allegations contained in paragraph Two and call for strict proof thereof.

3. The Respondents admit the allegations contained in paragraph Three.

4. The Respondents deny the allegations contained in paragraph Four.

5. As to paragraph Five of the Amended Petition, the Respondents admit only that a document was attached to the Petition as Exhibit B, but the Respondents are without sufficient information to admit or deny the authenticity of or the accuracy of the contents and information contained in Exhibit B and call for strict proof thereof. The Respondents deny all remaining allegations contained in paragraph Five, including any allegations that purport that this taking is for a constitutionally permissible public use. The proposed taking is for the private purpose and special benefit of the King family members.

6. As to paragraph Six of the Amended Petition, the Respondents admit only that a document was attached to the Amended Petition as Exhibit C, but the Respondents are without sufficient information to admit or deny the authenticity of or the accuracy of the contents and information contained in Exhibit C and call for strict proof thereof. The Respondents deny all remaining allegations contained in paragraph Six, including any allegations that purport that this taking is for a constitutionally permissible public use. The proposed taking is for the private purpose and special benefit of the King family members.

7. The Respondents deny the allegations contained in paragraph Seven, including any allegations that purport that this taking is for a constitutionally permissible public use. The proposed taking is for the private purpose and special benefit of the King family members.

8. The Respondents deny the allegations contained in paragraph Eight. Before it filed its Petition for Condemnation the Petitioner never made an offer to acquire the property it is now taking, specifically the new construction easements that have appeared in this Amended Petition for Condemnation. Furthermore, Virginia Code § 25.1-204 requires the Petitioner to provide the Respondents an appraisal with its offer. The Petitioner has never provided the Respondents an appraisal of the new construction easements the Petitioner is taking. Finally, the Petitioner's taking in this case lacks a constitutionally permissible public use, and its offer was made to the Respondents under the threat of condemnation for a private purpose.

AFFIRMATIVE DEFENSES

1. The Petitioner's actions are invalid because the Petitioner seeks to take the Respondents' property for a private purpose and not for a constitutionally permissible public use. The impermissible purpose of the Petitioner's taking is "to benefit a particular class of identifiable individuals." Kelo v. City of New London, 125 S.Ct. 2655, 2662 (2005). The sole beneficiaries of the taking, the King family, asked the Petitioner to take their neighbor's property for their own benefit. The King family then gave the Petitioner the money to take their neighbor's property. The Petitioner then exercised its power of eminent domain to take the Respondent's property for the Kings' benefit. Article I, § 11 of the Virginia Constitution and the Fifth and Fourteenth Amendments of the United States

Constitution prohibit takings "to benefit a particular class of identifiable individuals." The government's power of eminent domain is not available for the highest bidder or for the politically connected to use for their benefit at the expense of other citizens and property owners. If takings such as this are allowed to occur, the beneficiaries of a taking today will be the victims of a taking tomorrow.

2. The Petitioner's taking is not a public use as defined by Virginia Code § 15.2-1902 because the taking is not "necessary." The General Assembly defined "public use" for which counties may use the power of eminent domain as "all uses which are necessary for public purposes." Va. Code § 15.2-1900 (emphasis added). To constitute a "public use" under this definition, the condemnor's taking and public project must be "necessary" to achieve a valid public purpose. The alleged necessity of this taking is to provide better access for the King family which has an existing easement along the proposed road for which the Petitioner is taking the Respondents' property. This easement has provided the Kings access for many years. The Kings, as the easement holders, have a duty to maintain this easement, and the King's failure to maintain their own easement cannot create a necessity justifying the taking of the neighbor's property by the extraordinary power of eminent domain.

3. The Petitioner's Amended Petition for Condemnation is null and void and without legal effect because the Petitioner seeks to amend a Petition for Condemnation that was void ab initio or void from its inception. A party cannot amend a

document that is a legal nullity without any legal force or effect. The Petition for Condemnation which the Petitioner now seeks to amend was void from its inception because the Petitioner did not file the Petition in accordance with law and thus did not invoke the jurisdiction of this Court. Virginia Code § 25.1-205 states that "Proceedings for condemnation shall be initiated by filing a petition complying with the requirements of § 25.1-206 in the court." Section 25.1-206 states: "The petition for condemnation shall contain . . . a plat, drawing or plan, in sufficient detail to disclose fairly the nature of such work or improvements, including specifications, elevations and grade changes." (emphasis added). The Petitioner never included in its original Petition for Condemnation the requisite plat, drawing, or plan containing information regarding the construction specifications, elevations and grade changes. The Petitioner never filed a properly pled petition as required by the Virginia Code, and thus the Petitioner never invoked the jurisdiction of the court.

4. The Petitioner has not made a bona fide offer as required by Virginia Code § 25.1-204. Section 25.1-204 requires the Petitioner to provide the Respondents with an appraisal when it makes its offer to take the Respondents' property. The Petitioner never provided the Respondents an appraisal of the construction easements it now seeks to take in its Amended Petition for Condemnation.

5. The Petitioner's taking in this case is arbitrary, capricious, fraudulent, and in bad faith. The animating purpose of the proposed taking is to facilitate and foster the growth and private needs of

an illegal subdivision. The growth of the illegal subdivision created the purported need for the road the Petitioner seeks to construct on the Respondents' property, and the road will foster increased development of a subdivision that was illegally created. Halifax County's selective enforcement, or its lack of enforcement, of its zoning laws have created any purported need for the construction of the road. Instead of enforcing its zoning laws to prohibit the development of the illegal subdivision, Halifax County seeks to use the extraordinary power of eminent domain to condemn the Respondents' property in order to provide for the alleged needs of the private, illegal subdivision.

6. The Petitioner fails to enumerate the limitations on its use of the power of eminent domain. The Petitioner may exercise the power of eminent domain only according to the limitations and restrictions imposed by law and Article I, Section 11 of the Constitution of Virginia. The Petitioner may take property by the extraordinary power of eminent domain only for a constitutionally permissible public use.

7. The Petitioner's vague reference to temporary construction easement violates Sections 25.1-205 and 25.1-206.

8. In the event that this Amended Petition is not dismissed, the Respondents elect to have commissioners impaneled to determine just compensation in this matter.

WHEREFORE, the Respondents and property owners, D. Epps Lacy and James Lacy, respectfully pray that the Amended Petition for Condemnation be dismissed, with prejudice, that all relief prayed for by the Petitioner be denied, and that the Respondents recover their costs and attorney's fees expended in their behalf, as well as such other relief as may be required to attain the ends of justice.

D. EPPS LACY
AND JAMES LACY

By: /s/ Joseph T. Waldo
Counsel

[by Joseph T. Waldo
for Henry E. Howell, III]

Henry E. Howell, III
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer and Grounds of Defense to Amended Petition for Condemnation was mailed on this 29th day of November 2005 to:

Russell O. Slayton, Jr.
Slayton, Bain, and Clary
411 South Hicks Street
P.O. Box 580
Lawrenceville, Virginia 23868

/s/ Joseph T. Waldo
[by: Joseph T. Waldo for]
Henry E. Howell, III

VIRGINIA: IN THE CIRCUIT COURT FOR HALIFAX COUNTY
CL05-125

BOARD OF SUPERVISORS OF
HALIFAX COUNTY, VIRGINIA Petitioner

v.

D. EPPS LACY
1029 Love Shop Road
Halifax, Virginia 24558

AND

JAMES LACY
1065 Love Shop Road
Halifax, Virginia 24558 Respondents

AND (as to both Respondents)

2.50 acres in fee simple, plus five drainage easements located on property adjoining said 2.50 acres, all situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation

AND (as to both Respondents)

0.29 of an acre in fee simple, plus one drainage easement located on property adjoining said 0.29 of an acre, all situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation.

AND (as to Respondent D. Epps Lacy only)

0.39 of an acre in fee simple, situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation.

[Entered: November 17, 2005]

AMENDED PETITION FOR CONDEMNATION

COMES NOW your Petitioner, Board of Supervisors of Halifax County, Virginia ("Board"), and by its counsel respectfully represents as follows:

1. Your Petitioner is the governing body of Halifax County, Virginia ("County"), a political subdivision of the Commonwealth of Virginia, which is empowered to condemn real property and bring suits in its name on behalf of the County.

2. The Respondents, D. Epps Lacy and James Lacy, are the fee simple owners of the real property described above as consisting of 2.50 acres, 0.29 of an acre, and the six drainage easements which adjoin said properties, all shown on a plat (Sheets 1-5, inclusive) made by James T. Bradley, L.S., dated November 26, 2004 ("Plat"), a copy of which plat is attached hereto as "Exhibit A" and incorporated herein by this reference.

3. Respondent D. Epps Lacy is the fee simple owner of the real property described above as consisting of 0.39 of an acre, as shown on the Plat.

4. The authority for the taking is specifically provided by Section 15.2-1901.1 of the Code of Virginia, 1950, as amended, which grants to

the Board the power to acquire by condemnation title to land, buildings and structures, or any easement thereover, for the purpose of opening, constructing, repairing or maintaining a road, or for any authorized public undertaking, if the terms of purchase cannot be agreed upon, and Section 15.2-1902 of the Code of Virginia, 1950, as amended, authorizes the Board to proceed pursuant to the provisions of Chapter 2 (Section 25.1-200, et seq.) of Title 25.1.

5. The necessity for, and the public interest served by, the condemnation is the need to construct a new access road to serve the property located in the County which is known generally as King Village. A copy of a resolution adopted by the Board on March 1, 2004, authorizing the condemnation as a consequence of the need and public interest to be served is attached hereto as "Exhibit B" and incorporated herein by this reference.

6. Drawings which show proposed elevations and grade changes, if any, and the areas of Respondents' property over which temporary construction easements, if any, will be required, are attached hereto and collectively referred to as "Exhibit C".

7. The public use for which the property is to be taken is the construction of a new access road to serve the said King Village property, which access road will provide a safe and adequate means of traveling between State Route 614 and the King Village property, and which will enable access to the

King Village property by emergency response vehicles under all weather conditions, and which will enable public school buses to serve the public need for safe, adequate and convenient public school bus service to school-age children and their families.

8. In compliance with Section 25.1-204 of the Code of Virginia, 1950, as amended, the Petitioner has made a bona fide, but ineffectual, effort to acquire the real property and drainage easements described above, which effort was made by providing written purchase offers to the Respondents, which offers were based on appraisals conducted by Fred A. Smith, a duly licensed real estate appraiser.

WHEREFORE, your Petitioner prays for judgment that the real property described above as consisting of 2.50 acres, 0.29 of an acre, the six drainage easements which adjoin said properties, and 0.39 of an acre be condemned, and that title thereto be vested in Petitioner, free of encumbrance or claim; that just compensation for such real property and drainage easements be ascertained and awarded; that damages, if any, as a result of said taking and use by Petitioner, beyond the peculiar benefits, if any, by reason of the taking and use by Petitioner, be ascertained and awarded; and for such other and further relief as may be lawful and proper.

Respectfully submitted this 17th day of November, 2005.

BOARD OF SUPERVISORS OF
HALIFAX COUNTY, VIRGINIA

/s/ Russell O. Slayton, Jr.
Of Counsel

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of November, 2005, a true and accurate copy of the foregoing "Amended Petition for Condemnation" was served, via first class U. S. Mail, postage prepaid, on Jeremy P. Hopkins, Esq., Waldo & Lyle, P.C., counsel for Respondents, 301 W. Freemason Street, Norfolk, Virginia 23510.

/s/ Russell O. Slayton, Jr.
Russell O. Slayton, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF
HALIFAX COUNTY

BOARD OF SUPERVISORS OF HALIFAX COUNTY	)	
VS	)	CASE NO. CL05-000125-00
D. EPPS LACY and JAMES P. LACY	)	

The following transcript represents a stenographic report of an evidentiary hearing in the above-styled case, heard on the 14th day of September, 2005, at 9:00 A.M., in the Circuit Court of Halifax County, at Halifax, Virginia, before Honorable William N. Alexander, II.

APPEARANCES: RUSSELL O. SLAYTON, JR. and C. RIDLEY BAIN
Counsel for Petitioners

HENRY E. HOWELL, III and JEREMY HOPKINS of WALDO & LYLE
Counsel for Respondents

Earline F. Gosney
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THE COURT: Good morning.

THE CLERK: This is the case of Board of Supervisors of Halifax County versus D. Epps Lacy and James P. Lacy.

THE COURT: Is the plaintiff ready?

MR. SLAYTON: We are.

THE COURT: Is the defendant ready?

MR. HOWELL: We are, Your Honor. Your Honor, they are petitioners. We are respondents.

THE COURT: Okay. We are here on a motion as to public use, and public right of way, is that correct? Does everybody agree that's the issue that I'll decide today is whether or not the proposed take is for public use?

MR. SLAYTON: Yes, sir.

THE COURT: Would you like to make an opening statement?

MR. SLAYTON: We'd like first, Your Honor, to make a motion to separate the witnesses.

(All witness were separated and excluded from the courtroom.)

SLAYTON: Our client, the Board of Supervisors, we have a number of the members of the board here and we would suggest and request of the Court that they be allowed to remain in court to participate in this proceeding as parties to the proceeding.

MR. HOPKINS: Your Honor, we would object to that because it's not the board members in their individual capacity that are suing in this case. It is the board as an entity. It's no different than if you

have any other corporation or any other entity that takes property by eminent domain. Only one agent of that party is allowed to stay. This is not a suit that individually names the nine board members, it's a suit as one entity.

THE COURT: Why can't one member of the board sit in? Why do you need all board members?

MR. SLAYTON: Your Honor, as members of the Board of Supervisors they have a keen interest and as the evidence is going to develop this morning, their thought processes are going to be brought into play by the other side. They believe this is in fact very personal. They would like to participate as individuals.

THE COURT: I'm going to allow one member of the board.

MR. SLAYTON: We will keep the chairman.

(The other members of the board of supervisors were excluded from the courtroom.)

MR. SLAYTON: We're here this morning to determine issues raised in affirmative defenses pled on behalf of the property owners. We believe it is their burden to go forward with this affirmative defense.

THE COURT: I agree.

MR. HOPKINS: For the record, my name is Jeremy Hopkins and with me today is Henry Howell.

We represent the respondents, Epps Lacy and James Lacy, and Your Honor, I'd like to point out right at the beginning that this case is different from a motion for summary judgment and that we have a body exercising the power of eminent domain and the landowners have raised defenses and that question is a question that is reviewable by the Court, the question of whether there is a public use. Your Honor, what this case is really about today is about a strong and vocal faction that is using the board to take property for its benefit. James Madison and many of the founders feared that, Your Honor, that's why we put the public use clause in the constitution, was to protect property owners. What we have in this case is one family that has a private driveway, they have a right to maintain that driveway, and instead of maintaining it, Your Honor, they have asked the board to take their neighbors' property, essentially asked the board to improve their property at their neighbors' expense. And what the evidence will show today, Your Honor, is that the board is constructing $190,000 driveway for the benefit of this family, and the taxpayers will pay that $190,000. And what the evidence will show today, Your Honor, is that the alleged public use is a mere pretext for bestowing a benefit on a strong and vocal group that has essentially seized the board. And that's what it all boils down to, Your Honor, is that the take in this case doesn't constitute a public use under the very definition of public use as defined by the General Assembly, and it's certainly not public use in light of the pretext, and that's what the evidence will show here today, Your Honor. I will give the Court a memo to lay out - or give the Court

a road map, and I also provided a copy to opposing counsel. That's all I have at this time, Your Honor.

THE COURT: Thank you, Mr. Hopkins.

MR. SLAYTON: Your Honor, may it please the Court, my name is Russell Slayton. I'm appearing this morning, of course, on behalf of the Board of Supervisors. With me is my partner, Ridley Bain. Your Honor, I'll have to begin by observing that my client will be glad to hear that they are a strong and vocal group. When the evidence goes forward this morning, what the evidence is going to reveal is that this is an issue that has been pending in this community for more than twenty-five years. This has been an area of concern that has been perpetuated and continually brought back before the Board of Supervisors. We'll get there later in the proceedings this morning. Your Honor, as has correctly been represented to the Court, there is one issue before this Court this morning, and that is if this land is taken and the road is constructed, will there be a legitimate public use. Will the proposed use of the road constitute a public use, as contemplated under the condemnation laws, We would suggest to the Court that the answer to that is an unequivocal yes. The case law that will be argued later will show that the test for that determination is public use, not public benefit. There's a long line of cases which say the benefit can be peculiar to one class of persons over another, no matter how small that group, and if the public use has been satisfied, that there's a valid taking. There's even one case in which a condemnation existed because the taking was alleged to be for the

benefit of one property owner only. The Court in that case ruled that because it was public use, because the road itself would be in a public domain, that it's public use and the special benefit realized by one party would not spoil the issues of that use. The case here today will be much greater for persons who will benefit than just one in that case. Your Honor, there are four affirmative defenses which have been raised, and we think the law is clear on all four. The first is that there is no public use. Again, our evidence is going to show that the property being taken will be developed for a secondary highway and all the necessary groundwork has been laid with the Virginia Department of Transportation for those improvements to be made and this road to be accepted into the public highway system. We could say that that alone determines the issue of public use. In an effort to get past that problem, the landowners have represented in their pleadings that there are three special circumstances present this morning. One that has been alleged is fraud. We will not address that. We have no idea whatsoever what the basis could be for such an allegation. There was no such evidence developed during the discovery depositions. We believe that allegation to be without basis, and in fact we anticipate that there will be no evidence produced today on that issue. So we are really down to two affirmative defenses, and those affirmative defenses is that the action of the Board of Supervisors that brought us to court this morning was arbitrary and capricious. Those are two words, Your Honor, when I looked up in the dictionary, that indicates the actions are taken without forethought or consideration. The record in this case is going to show that this issue has been

before the Board of Supervisors for a minimum of twenty-five years, and because it' s much too great a period of time for us to explore this morning, we will telescope that down to the last two and a half years. In that period of time this Board of Supervisors has appointed road viewers, according to the Code of Virginia, an independent group of citizens to study this issue. They have provided to those road viewers all the support they need from appraisers, from surveyors, from representatives of VDOT and legal counsel, so they could do their jobs. They did their jobs and made findings and recommendations. Our evidence is going to show that this board has made a concerted, somewhat expensive and very extensive effort to resolve this matter on two other instances that did not prove successful. Ultimately this board decided that enough was enough, this issue has been considered long enough, we're in agreement this road in needed. The only thing left is going to be the location of the route for the road, and for that reason and that reason alone this board took the action to initiate condemnation proceedings. In the memorandum that we were handed just this morning, just ten minutes ago, there is a suggestion which frankly baffles us, and that is that race somehow plays a role in this proceeding. There's an allegation in the pleadings that somehow the African-American community is a particularly strong force in this community. That will come as quite a surprise to many who for twenty-five years have tried to get a Board of Supervisors to reach this point. That comes as a surprise to the Board of Supervisors, which is constituted by eight members; six of them are white, who voted to proceed as we are today. In conclusion in my opening, Your Honor, we

think the ultimate use is crystal clear. We think that the two efforts to overcome it on the arbitrary and capricious basis has no merit. I failed to mention one other element that has been pled, and that is that because the allegation is some of the deeds which have been admitted on behalf of the owners of property did not comply perfectly and absolutely with the requirements of the county subdivision ordinance. We deny that. When the evidence is concluded we'll find that that is not the case. Our position, however, is if that were the case, it would be irrelevant. If there is a valid public use, the fact that the public road being constructed may go by one or more houses that did not comply perfectly and absolutely with the requirements of the county subdivision ordinance would be irrelevant. If that were the standard, I doubt any locality would satisfy the requirement. So we believe that allegation to be irrelevant, and we strongly urge that position. However, if it proves necessary, we will put on evidence there is no problem. At this point, Your Honor, I rest.

THE COURT: All right, Mr. Hopkins, if you will call your first witness.

RICHARD ABBOTT

the first witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

By MR. HOPKINS:

Q. Good morning, Mr. Abbott. Would you please state your full name for the record?

A. Richard Elijah Abbott.

Q. And what is your address?

A. 3118 Cody Road, Nathalie, Virginia.

Q. And your occupation?

A. Halfway farm.

Q. Are you on the Board of Supervisors for Halifax County?

A. Yes, sir.

Q. How long have you been on the board?

A. I think this is the thirty-eighth year.

Q. Thirty-eight?

A. I think it is. I went on in 1968, beginning January of 1968.

Q. Are you familiar with the King property?

A. Yeah, quite familiar, yeah.

Q. And the King family asked the board to take property for them?

A. Yeah. I guess that's the best way to put it. Yeah.

Q. They asked the county to build a driveway to their property?

MR. SLAYTON: I object to the characterization.

THE COURT: Objection sustained.

Q. Let me ask you this then, Mr. Abbott. Is the board taking the Lacy property?

A. Taking the Lacy property?

Q. Yes.

A. So I've been told it is.

Q. And are the Lacys the Kings' neighbors?

A. I would think they would be.

Q. The Lacys own property adjacent to the King property?

A. I think so. I haven't searched the record, but I think so.

Q. And the board is taking property to build a paved road for the King family, correct?

A. I'm not sure whether it's gonna be paved, but they upgraded it to a pretty safe system.

Q. Isn't it a fact that that road will cost the taxpayers $190,000?

A. I've been told that.

MR. SLAXTON: Your Honor, I would appreciate it if he would not lead the witness.

THE COURT: Is the cost relevant?

MR. HOPKINS: We will get to that, Your Honor. It is relevant in this case because part of that cost is being paid by this family, by the King family.

THE COURT: You can get to that. I agree with Mr. Slayton you have been leading the witness. Just let him testify. Ask him the questions and let him testify. He does not seem to be hostile in any way.

Q. Have there been marches and demonstrations regarding this road?

A. Well, I guess you could say that once or twice they gathered down at the church down the street from where we live, and they marched up to the board. Whatever you want to call it. I don't know.

Q. When you say "they", who marched?

A. The King supporters.

Q. So family members of the Kings?

A. Some of them were family members, some of them wasn't.

Q. Was the NAACP involved?

A. I suppose so. I don't know. Individually NAACP members.

Q. Did the Kings put pressure on the board to take property for them?

A. Well, I would think so, but there again, that's my judgment.

Q. You were there at the board meetings, weren't you?

A. I was there, heard all of them, yeah.

Q. Tell the Court a little bit about what those meetings were like, meetings where this proposed road was discussed.

A. Well, a whole lot of them stood up. They had a certain time that they brought it up, and that was pretty often, but they had people speaking for it and I don't know, sometimes it was ten or twelve or more people there.

Q. Let me ask you real quickly, Mr. Abbott, did you speak with anyone today regarding your testimony here in court today?

A. No, sir. To tell you the truth I haven't talked to anybody since I saw you all.

Q. Okay. Can you tell me, did anyone ever raise race as an issue at the board meetings?

THE COURT: Are you talking about board meetings at which this was discussed?

MR. HOPKINS: Yes, Your Honor.

MR. SLAYTON: Before we proceed, I'd like to object on the grounds of relevance. Race has no place in this proceeding.

THE COURT: What is the place that race has?

MR. HOPKINS: Your Honor, what we have is we have a small faction, minority faction at the board meetings and you'll hear from the board members they interjected race, and we also have some of the representatives that have interjected race in this issue, Your Honor, and it goes to the fact this is to benefit this one family. The Lacys never interjected race into this, Your Honor. This was interjected by the beneficiaries of the board themselves.

MR. SLAYTON: May I respond? Excuse me. The issue of whether this was taken for one family is the heart and soul of this hearing, heart and soul of the case. Is it taken for public use or is it not? Race has not been pled; race has nothing to do with this. We can call board members, we can bring the board

members out so this Court can see that the six-member majority is white. We think it's inappropriate and doesn't have anything to do with this proceeding.

MR. HOPKINS: Your Honor, if I can respond to that. We have the president of the NAACP present here today. He was one of the spokespersons for the estate. He was the one who led the marches, led the protests. The Lacys never interjected race. That was an issue, again, that was interjected by the beneficiaries of the board members, and Mr. Abbott will testify, as in his deposition, that it was an issue for the board members. We have another board member to testify to that.

THE COURT: Still the issue is whether or not it was a proper take and whether or not there was 'a race issue is obviously a completely side issue. It may become clearer as we go through the case. If that's the case I'll change my mind, but at this point I don't view this as an issue of race against race. The question is whether or not this road is being taken for a public use. That's the question, and I don't see how race - if the board members say "Yes, I was pressured because of the NAACP" or "I was pressured because there were marches" they can testify to that. He can testify why he voted the way he did. I'm not going to let this degenerate into a race question.

MR. HOPKINS: Can I ask the witness then, Your Honor, if race was a motivating factor?

THE COURT: Ask him why he voted as he did.

Q. First of all, how did you vote on this issue?

A. How did I vote on it? I voted so many times, but to start out with I was voting on the - it was always a four to three vote for a good time.

THE COURT: Four to three which way? A. Four to three against the King road. Then it got to be — am I allowed to say it?

Q. Yes. Please tell the Court.

A. Then it got to be - I don't know whether it was pressure, but people would talk, different ones would say "You ought to do this" and "You ought to do that. I don't agree with that, because I think I've got a mind of my own. I think I can vote the way I want to whether they like it or not. So that's the way I voted every time up until it got to where it was voted on pretty often. They kept on pushing. I just kept my mouth shut. I didn't vote no more.

Q. What do you mean they kept on pushing?

A. Well, they kept on bringing it up to get it passed, you know.

Q. Who is "they"?

A. All the people, the King family.

Q. The King family. Has it been the county's policy in the past not to take property for secondary roads . . . ?

MR. SLAYTON: Your Honor, I object to that. That is a mischaracterization of the question. We're going to lay the groundwork that there is a board policy but we're not there yet.

THE COURT: You can ask if there is a policy.

Q. Is there a policy regarding takings for secondary roads?

A. It used to be, but I don't know about now. It used to be.

Q. It used to be until this taking?

A. Well, I can' t remember but one place - one person that got a road through that same method, and that happened a year before I went on the board,

Q. About forty years ago, approximately?

A. Right. Forty years ago, yeah.

Q. So the county typically does not take property for secondary roads . . .

MR. SLAYTON: I object to the leading question.

THE COURT: Objection sustained.

Q. Will you please state whether the county typically takes property ....

THE COURT: He has already said there was one before. Let's go on. Forty years ago.

Q. Have other people asked for a road before board meetings?

A. Oh, yeah.

Q. Has the county ever taken property by eminent domain to provide them a road?

A. Not to my knowing.

Q. And would you say the take in this case is an exception?

MR. SLAYTON: Objection.

THE COURT: Sustained.

Q. Can you describe the driveway for me — I'm sorry - this road that they are building for the King family?

A. I never have been over there on it. 'I've just been to where it goes in. It was kind of rough in there, that part that I saw. I've never been all the way down there.

Q. And where does this road begin, this proposed road?

A. I don't know whose land it begins on but I would imagine it begins on probably Mr. Lacy's land. If not, pretty close to it.

Q. And where does it end?

A. I don't know. To be honest with you, I don't know the end of it, but I think maybe Ward Burton has got some land down in there, I believe.

Q. Does this road go to Ward Burton's land?

A. I don't know. I don't know for sure.

Q. Do you know if the board ever consulted any emergency response departments before voting for this taking?

A. Not to my knowing.

Q. So they did not? They did not consult any emergency response departments?

A. At one time they did as for some vehicles to be pulled out or something like that. I guess you would call it emergency.

Q. What I'm asking specifically, Mr. Abbott, to your knowledge the board never consulted - before voting for this take, they never consulted any of the emergency response departments, such as the fire department, police department or EMS?

A. Not to my knowing.

Q. To your knowledge did the board ever consult anyone from the school system or anybody with the Department of Transportation or the school system?

A. I know the Department of Transportation was interested in it. Mr. Barkley was there a whole lot of times when it was discussed,

Q. He's with VDOT, is that correct?

THE COURT: Let's ask one question, get the answer, then go to the next.

Q. You brought up Mr. Barkley. Is he with the school system?

A. No, sir. He's with the highway department. He's the regional manager.

Q. To your knowledge did the board ever consult anyone from the Halifax County School System?

A. Not to my knowledge.

Q. To your knowledge are there other roads like the King road that exist in Halifax County?

A. Oh, yeah. There's oodles of them.

Q. I'm sorry. I didn't understand you.

A. There was oodles of them.

Q. You say there are oodles of those. Does that mean hundreds?

A. No, I wouldn't say hundreds, but we've got a bunch of them around. I've been contacted a bunch of times to get into the system and, you know, you couldn't get enough people to do it, you know.

Q. When you say you've been contacted to get into the system, you mean people would come to you, other owners of these types of roads and have asked the county to take property?

A. Yes, sir.

Q. And the county denied it?

THE COURT: Is this at all relevant? We need to move on. I don't see any relevance whether there are other roads or not.

MR. HOWELL: Your Honor, it goes to the arbitrary and caprice, as far as — there are hundreds of roads like this. They have singled out this one road.

THE COURT: He didn't say hundreds of roads.

MR. HOPKINS: He said oodles, Your Honor.

THE COURT: I don't know what difference it makes anyway.

Q. Were there any accusations made at the board meetings that you do recall, regarding any ill motives or purposes for this taking?

A. I don't think I remember, I may have heard some, but I don' t remember, no.

MR. HOPKINS: All right. That's all I have, Mr. Abbott. Thank you.

THE COURT: Mr. Slayton.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. Mr. Abbott, you mentioned that that there was a four-three vote for many years. This has been before the board for a long time, hasn't it?

A. Ever since the '70s.

Q. So thirty or thirty-five years?

A. Somewhere in the neighborhood of '74, '75 or '76, somewhere along there.

Q. And the makeup of the board has changed over time?

A. It has changed drastically, yes, sir.

Q. For the record, how did you vote the issue? Did you vote for against condemnation?

A. Against condemnation to start with all the time, but it has been — I can name off the ones on the board. It has been a bunch of people on the board.

THE COURT: That's not the question. The question here is how did you vote?

A. I voted no.

Q. You voted against it?

A. Yes,

MR. SLAYTON: All right. Thank you very much.

THE WITNESS STANDS ASIDE.

REVEREND ROGER FORD

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Reverend Ford, Hank Howell here, representing Epps and James Lacy.

THE COURT: In court I prefer everybody use titles. Use Mr., Dr., things like that.

Q. Mr. Ford, I'm Hank Howell representing Mr. Epps and Mr. Lacy. I think you've met my associate here, Mr. Hopkins. Introduce yourself to His Honor, please.

A. I'm Roger Ford, Sr.

Q. Do you live in this community?

A. Yes, I do.

Q. What's your occupation?

A. I pastor New Zion Baptist Church and I own some property across the street.

Q. Have you been active in the NAACP?

A. Yes, I have.

Q. Are you past president of the NAACP?

A. Yes, I am.

Q. Do you know the King family?

A. Do I know the King family?

Q. Yes.

A. You mean the people that live in King Village?

Q. Yeah, the King family. When you say "King Village", what do you mean?

A. I'm not really from this area. I've only been here since 1990. I know people who live in King Village. If you're talking about the people who live in King Village, yes, I know them.

Q. Who do you know in King's Village?

A. I know practically all of them. I may not be able to call all their names, but I know them.

Q. How do you know them all?

A. Because I see them in church, I've seen them in meetings, I've seen them different places. I don't live that far away from King Village.

Q. Who do you talk to most - well, are they all descendants of Thaddeus King?

A. I do not know.

Q. Do you understand them to be related family members down there?

A. I'm not really sure. As I say, when you don't go to school in a community and raised up with 'the people, you don't know. You know them by face but you don't know them by name, and so I can't say I know.

Q. Who do you know best down there at King Village?

MR. SLAYTON: Objection. He's leading.

THE COURT: I'm not sure - the fact that he knows people down there, how is this relevant?

MR. HOWELL: Well, I'll get to it. I'll move ahead. I'm trying to find out how he does know and got involved.

Q. Did you get involved with - I'm going to call them the King family down there. Do you mind if I call them that? Do you know who I'm talking about, the people who live down in that driveway? I'm going to call them the King family just so you understand who I'm talking about.

THE COURT: You're talking about the people who live in what y'all call King Village.

MR. HOWELL: King family, I think it's King's Village Trail. I don't know what it is, Your Honor. King family. They all are supposed to be related. If they live back there and they're subdivided, the law says they're supposed to be family members. We'll get into that.

Q. Anyway, I'm going to call them the King family, the people who live down this driveway. It's a driveway, isn't it?

A. I don't see it as a driveway. To me it's a road.

Q. Have you been down the road?

MR. SLAYTON: Your Honor, I object to the characterization of the road, the project, as a driveway.

THE COURT: Mr. Ford just said he didn't characterize it as a driveway. He characterized it as a road. So let's go on.

Q. Have you been down there?
A. Yes.

Q. So it's a road now?

A. Yes, sir.

Q. Okay. Well, describe the road.

A. It's I think close to a mile. You cannot pass a car. If you meet a car, if someone is coming out and someone is going in, you're gonna have to back God knows how far to try to let the other person by. So to me it's a hazard, to tell you the truth.

Q. Is it a gravel surface?

A. I think they put gravel on it time and time again, but it washes off.

Q. Who is "they"?

A. The people that live down there, I suppose.

Q. Okay. Do you regularly go to the Board of Supervisor meetings?

A. Yes, sir.

Q. And when did you first get involved in the county building this road for the people down at the end of the road there?

A. Sir, I'm a preacher. I've been one for forty-three years. I believe that as a preacher you're supposed to stand up for what's right and I believe that - I'm a Christian and I believe in the Christian idea when Jesus said you should do unto others as you would have them do unto you.

THE COURT: Mr. Ford, let me interrupt you. What I want you to do is just answer the question. Okay?

A. Okay.

THE COORT: Re-ask the question.

Q. When did you first get involved in speaking out on behalf of the people to have the county build a road for them?

A. I don't know. I attend board meetings all the time. If it came up, I more than likely spoke.

Q. Let me take you back to 2002, August of 2002. Do you remember any activity at the board meeting relating to the road for King Village?

A. Not specifically, no.

Q. Let me ask you this. Do you remember a public hearing where three hundred and fifty people showed up about this road?

A. That's right.

Q. And you spoke there, is that right?
A. That's right.

Q. Do you remember other people speaking there?

A. There were quite a few people that spoke.

Q. What did you say?

A. Sir, I can't remember what I said yesterday. How am I to know what I said?

Q. All right. Do you remember going to the October meeting and speaking?

A. I probably did.

Q. Let me ask you this. Did you read the newspaper after meetings and you spoke and see you were quoted in the newspaper?

MR. SLAYTON: I have several objections. One is it's not at all clear to me what the relevance is of one person who spoke in a public forum on this

issue. The second is quoting what a newspaper article was talking about without producing it.

THE COURT: I'm not sure where we're going. What difference does it make whether he spoke in favor? I presume he spoke in favor. What difference does it make?

Q. All right. So we had three hundred and fifty people. You spoke there. Then there was another meeting. Do you remember gathering people at a church to go over to the Board of Supervisors in November of 2002 to march as a group over?

A. I don't know whether that's the date or not. There was a group of people that went over there.

Q. Did you speak to the group at the church?

A. No.

Q. Didn't speak to anyone?

A. No.

Q. How did you know to go there?

A. How did I know to go there?

Q. How did you know to go to the church to march over to the board meeting?

MR. SLAYTON: Again, I'm not sure it's relevant how he knew to go to a place where a crowd was gathered.

THE COURT: Suppose there were multiple gatherings and multiple marches and suppose they did everything they could. That's the way sometimes things happen. If the board decided, even under pressure, what difference does it make for this proceeding? The proceeding here is whether or not the take was for public use. Isn't every politician pressured every day? They're having one or two of these hearings in Washington now. Anybody look at Kennedy yesterday? Is he not pressured? Where are we going? I think we're just getting far afield. What I'm interested in is what this man knows, or what any witness knows, that will help me decide whether or not this taking is for public use. That's what I've got to decide. How is that going to help me? If it is going to help me, then it's relevant.

MR. HOWELL: Your Honor, if the Board of Supervisors is reacting to a vocal faction of three hundred to three hundred fifty members of the African-American community, if people are accusing the board of racism, if nothing happens in twenty years to this road, and so Mr. Ford and other people organize a group of African-Americans to march on the Board of Supervisors and accuse them of racism, accuse them of unfairly treating the King family because of race, and the vote comes to condemn, even though it's been on the table for twenty years to this day, not until the NAACP gets involved, the president of the NAACP, Mr. Ford, former president of NAACP, and all these people come in and accuse

the board of racism, treating people unfairly, then the motivating factor here that changes things for twenty years is that they're responding to accusations of race, Your Honor.

THE COURT: I understand exactly what you're saying, Mr. Howell, but what I'm asking you is this. This is what happens in a political country. Have you ever been to a town meeting or a city council in which people show up and they show up for one reason, to request one particular point, and many times these organizations plan to do that. That's not the question. We know that. This board may have been pressured, but what difference does that make? The question is I'm not going to set this aside because the board was pressured. That's not the issue, if they were pressured. Maybe not. Maybe they will stipulate they were pressured, but if they were pressured, that's not what I have to decide. What I've got to decide is whether this is for public use. If they were pressured and end up doing the right thing, what difference does it make? If they did the wrong thing, then I can correct it.

MR. HOWELL: That's the whole history of condemnation cases, Your Honor, where they're set aside because there is a pretext - I mean you might have a public road, or you might say "I want to build a road for a shopping center" and we don't look back, and it's a public road, they they'll come in and set it aside if it's for an identifiable group of individuals, if they're taking from one individual to benefit them. Now, they come in and say "Oh, it's a public road, anyone can use it", but the law is if a special group of people have gotten to that governing body and it

could be cash or it could be "I'm gonna vote you out", but if it's a special group that they say "All right, we're benefiting you and we're using the power of eminent domain to benefit you to the detriment of the others", then that special group, that is not public use. That is a pretext. It is for a special private party, and the majority in Kelo and the concurring opinion of Kennedy in Kelo made it quite clear that in Connecticut's case they didn't know who would benefit from the public improvements in the beginning, and in the cases in Virginia where you know the exact parties that are benefiting, it's going to get additional scrutiny. Just because a resolution is passed and Justice Hassell wrote "Just because we got a resolution the court doesn't throw up his hands and say well, the resolution says it's for public use."

THE COURT: Look, that's not the question. The question is - you're trying to lay the groundwork of which the board was pressured. The board is pressured every day, and any decision is controversial. They are pressured by both sides. You know that. I know that. Why do we need to spend hours determining whether or not the board was pressured?

MR. HOWELL: Because Your Honor, if it's based on accusations of race and they are appealing to a group based on the race of the group, then I think - you know, sure we get pressured. I want the shopping center, the people in the neighborhood don't want the shopping center. That's fine. But when race comes in to the picture in this country, we've been rather sensitive and the shoe fits for both sides. If somehow someone is getting favored

treatment because of their race and a special benefit and the power of eminent domain is used on their behalf based on their race, we need to take a close look at it to see if the public use is really it, or is it because they want votes based on race and they're feeling the pressure and they're feeling sensitive and they're accusing us of racism, and we don't want that.

THE COURT: I think you're trying to make this whole procedure something it's not. I'm going to let you answer the questions. At the end of the day — and you know the end of the day is approaching, and I'm not going past one o'clock. It's going to be finished. All of you know I've made it very clear to you, I've got another hearing at one o'clock. I'm going to let you go, you can call your witnesses as you want, but I'm telling you your evidence is going to be finished. We started at nine o'clock; you can have two hours each. That's all you've got. You do it however you want to do it, but you're going into things that are totally irrelevant.

Q. Reverend Ford, at these meetings, you were in the march and you marched over, correct?

A. Yes.

Q. And the president of NAACP was there, Mr. Carr?

A. Yes, but he's not the president.

Q. He was in 2002,

A. No, he wasn't.

Q. He wasn't?

A. No.

Q. Okay. Who was president?

A. I was.

Q. Okay. So you were there in the group as president?

A. That's right.

Q. Okay. Of the three hundred and fifty people at the public hearing speaking for King Village, was the majority African-American community?

A. Yes.

Q. All right. The march of two hundred, were they all members of the African-American community?

A. I would say most of them were.

Q. Okay. Did you attend the public hearing that Mr. Russell Slayton was late for?

A. Yes,

Q. Do you remember . . .

MR. SLAYTON: I object to the characterization. I think the record will show that I was on time.

Q. Did you complain to the board about having to wait on the King Village hearing?

A. That's possible. I cannot say. I can't remember what I did three years ago.

Q. Well, let me show you, see if this refreshes your recollection. It's some minutes of the board. You might remember the time you were down there asking for your water hookup. What did you accuse the board of?

A. I said that - what I was trying to say was that you have all those people living down in there. A school bus cannot go in there. An ambulance has a hard time getting in there. The fire department has a hard time getting in there. I was trying to say that they need the road because if a person gets sick or anything in the middle of the winter with snow and ice covered on the ground, an ambulance can't get in there. The mail can't go in there. That's enough to say they need the road,

Q. I mean that's not what you said at the meeting where you were trying to get water hookup, right? I ask you if this helps you remember what you said at that meeting. Do you remember what you said at that meeting when you went for the water hookup?

A. What water hookup?

Q. It says you were there because you wanted water, run a water line to your property.

A. Oh, to my property?

Q. Yes.

A. Okay.

Q. You remember that meeting, right?

A. I remember.

Q. Okay. I'm asking you what you said at that meeting. Do you remember how you characterized the board's treatment of the black community?

A. Well, I don't live in a black community,

Q. Okay. The black population, I think it said. Do you making that accusation?

A. What I was saying was that I was not getting water.

Q. No, I'm talking about what you said about the King family, after you got through with your water hookup. Does that help you remember what you accused - the type of treatment. . .

A. What did I say?

Q. The first line there.

A. That the black community can't get treated fair. That's true.

Q. It is?

A. That's true,

Q. And you brought that up on the King family?

THE COURT: I didn't hear what you said. What did you say?

A. I said that black families are not treated fairly in this county and I stand by that. That's true.

Q. And you applied that to the King family, right?

A. No. That was a statement.

Q. But it was in the context of the King family village, right? That's what you were speaking about at the time, right?

A. I don't think so.

Q. What prompted you to remember that statement about blacks being treated unfairly in this county and the country is in the context of the comment on the King Village, is that right?

A. I don't know whether it was King Village.

Q. Just read what you said about accusing them of treating blacks unfairly. Isn't it talking about the King Village, the King family? I'm just saying is it in the context of your commenting on the King Village?

A. I don't know what you're talking about. Well, I know what you're talking about but I can't say it was in the context of that.

Q. Right there were you speaking about the King Village?

A. No.

Q. Take a look at it. Right below your comment about . . .

THE COURT: Mr. Ford, just look at that and see if the refreshes your recollection as to whether or not-you were talking about King Village. Just tell us whether it refreshes your recollection as to whether or not you were talking about King Village.

A. I was talking about where it was placed on the agenda.

Q. The King Village matter?

A. That's right.

Q. Okay. And you thought that was an example of blacks being treated unfairly?

A. Yes.

Q. And you told the board that?

A. Yes.

Q. I've got one more thing for you. October 10, 2002, what did you tell the board there?

A. I do not know.

Q. Okay. Let me show you the newspaper to refresh your recollection to see if that helps you. I don't know if you want to read the whole thing. There's a quote there from you.

THE COURT: Why don't you show him what you're talking about.

Q. Right there. "I'm going to tell you we're not going to go away. We're going to do our best to get rid of you if you don't help us. That's not a threat, that's a promise" Ford told the supervisors. Did you read that?

A. I read that. That's what the newspaper report said. I'm not sure I said that, but anyway . . .

Q. Did you say something like that?

A. I keep telling you, I can't remember what I said years ago. That newspaper is not the gospel.

Q. I'm just asking you did you say something like that?

A. I do not know.

Q. You don't remember at all?

A. I remember speaking but I don't know verbatim what I said.

Q. Okay. I'm just asking you if you said something like that. You're under oath now.

A. I know I'm under oath.

Q. Okay. Did you say something like that?

A. You keep asking me the same question. You just twist it around another way.

Q. I haven't gotten an answer. Did you say-something like that?

THE COURT: He has said three times that he doesn't know. You can ask him one more time. That's what he said three times.

MR. HOWELL: That's all, Your Honor.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. Mr. Ford, your appearance before the board in August, 2002, did you appear in your

individual capacity, or in your capacity with the NAACP?

A. I never appear in the capacity of the NAACP. The board has a ruling that you cannot speak on behalf of an organization unless you have it in writing that they gave you permission to speak. I spoke as a citizen.

Q. And there was a section of the meeting that allowed citizens to comment?

A. That's right.

Q. Did other people speak as well during those meetings?

A. As citizens.

Q. Have you been down to King Village Trail or Road?

A. Yes.

Q. Again, describe for me — give me a description of that road, if you would.

A. That road is approximately a mile. It's nine-tenths of a mile. It's narrow, it's rough. I understand that in the wintertime it's next to impossible . . .

MR. HOWELL: Objection, Your Honor. Hearsay.

THE COURT: Only testify as to what you actually know now.

Q. What have you seen?

A. Okay. The road is narrow, you cannot pass on most of it.

Q. Is it a dirt road?

A. It's a dirt road and it's rough.

Q. Does it have pot holes? Is that what you mean by rough?

A. Pot holes and ruts.

MR. HOWELL: Objection. Leading, Your Honor.

THE COURT: Sustained.

MR. SLAYTON: Judge, they called this witness.

THE COURT: They did.

MR. SLAYTON: I believe I'm on cross, Your Honor.

THE COURT: He has already testified what the road looked like. People had to back up; two cars couldn't pass in there.

MR. SLAYTON: That's fine. That's all the questions I have.

THE WITNESS STANDS ASIDE.

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EDITH OWEN

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOPKINS:

Q. Good morning, Ms. Owen.

A. Good morning.

Q. Ms. Owen, I'll be asking you some questions here today. If you could, please state your full name for the record.

A. Edith Kay Owen.

Q. And where do you live?

A. I live on King's Village Trail.

Q. King's Village Trail?

A. Yes.

Q. So you live on what is known as the King property?

A. Yes.

Q. Who else lives on this property?

A. My nieces and nephews.

Q. Is there anybody else?

A. On the King property?

Q. Just on the King property.

A. Just nieces and nephews.

Q. So they're all descendants of Thaddeus King?

A. Yes.

Q. So they're all family members of the King family through either marriage or blood?

A. Yes.

Q. How long have you lived there?

A. I've lived there all my life.

Q. How do you get to the King property?

A. It's off 614.

Q. And so do you have a driveway off of 614?

A. We just have a gravel — it's a dirt road,

Q. Dirt road? Does it have gravel on it?

A. Yes.

Q. So this dirt road starts at Route 614. Can you describe where the route runs from there, from 614?

A. From 614 it goes down into King's Village, about a mile.

Q. About a mile?

A. A mile long.

Q. Has this been the road that the family has always used?

A. Yes.

Q. Who were the first family members to own this property?

A. My grandfather that I know of.

Q. What was his name?

A. Ed King.

Q. And this was the same road that Ed would have used to get to his property?

A. Yes. He used the road on the other side to get to his property.

Q. The road I'm talking about is the road starting on 614 and going back to King Village. How long has the family used that road?

A. For quite a while. I was born there, and I'm eighty-six.

Q. Has the family always maintained that road?

A. Yes.

Q. And how have they maintained it?

A. By dragging it and putting gravels on it, putting rocks in the pot holes.

Q. So you did have a right to maintain the road then?

A. Yes.

Q. And you say this driveway starts at 614. Does it run through the Lacy property?

A. Yes.

Q. And the Lacys are your neighbor?

A. Yes.

Q. Can you state whether you have any knowledge of whether the King family ever offered to buy property from the Lacys?

A. Yes. We've offered to buy the land from the Lacys.

Q. And were they willing to sell you property?

A. Well, when we asked he said - first he said if we would build him a fence for his cows and put him in a septic tank, he would give us the road. We offered to put in the septic tank and build the fence. I called Mr. Hughes and asked him about building a fence. I told him we would do it. He said we couldn't build a fence. I called Mr. Hughes. He said he had stopped building fences, but he said, "I have done some work there, so I'll put the fence in for you." I said, "Okay. I appreciate that."

Q. Did you ever - let me ask you this. Did you ever buy property from the Lacys?

A. No.

Q. And after Lacys didn't sell you the property, did the King family approach the board about this road?

A. The Board of Supervisors?

Q. Yes, ma'am. I'm sorry. The Board of Supervisors.

A. Yes.

Q. Did they ask the supervisors to take property to construct a road for the King Village?

A. Yes, we asked if they would.

Q. With regard to the road, is there a school bus stop at the end of the King Village Road?

A. Up at the top of the road. They don't come down in there.

Q. So it's at the intersection of 614 and the King Village Trail?

A. Yes.

Q. The school bus stop?

A. 614 and King Village Trail.

Q. How long have school children caught the bus there?

A. They've caught the bus all along. We had to walk to school. The bus would pass me and I'd be walking. I had to walk to school.

Q. So when you were small you walked all the way to school?

A. I walked all the way to school.

Q. Would you say it has been fifty or sixty years since kids have been catching the school bus there at that bus stop?

A. I'm not sure.

Q. Many, many years though?

A. Yes, many years.

Q. Has there ever been an accident involving the school bus or school children at that bus stop?

A. I'm not sure.

Q. Do you remember when I took your deposition last week?

A. Yes.

Q. Do you remember when I asked you had there been any accidents involving the school bus or school children? Do you remember me asking you that question?

A. Yes.

Q. Do you remember your answer?

A. I'm not sure.

Q. Do you remember telling me no, there hadn't been any accidents involving school children?

A. I don't know. I really don't know. I think that's what I answered, I didn't know.

Q. As far as children catching the school bus at that bus stop, you're telling me that some of the children walked up the road, but aren't some of the children driven to the bus stop?

A. Lots of times it's too rough for them to walk up there to catch the bus, so members of the family take them up to the top of the hill to catch the bus. Then too they're afraid of the cows too. A lot of times the cows be out there and they are afraid to walk by the cows.

Q. One last question for you, Ms. Owen. Has the King family paid the county any money to take the Lacys' property?

A. I think so.

Q. Do you know how much the King family has paid the county to take the Lacys' property?

A. I'm not sure. I think it's probably $12,000.

Q. About $12,000?

A. I think so.

Q. And that was paid by the King family?

A. Yes.

MR. HOPKINS: Thank you, Ms. Owen. Thank you for being here today. That's all I have for you.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. The money you just referred to, was that paid into an escrow account, holding account, pursuant to the board's request?

A. I would say so.

Q. Tell me the condition of the road that you live on, King Village Trail. Tell me what it looks like.

A. It's very rough.

Q. And what do you mean by rough?

A. When it's raining, it's hard to get in and out, because the road is not wide enough for two cars to pass and when we meet a car, we have to stop — it's just one or two places on the road that we can pull out, so one of us has to back back. When it's raining it's slick, it's hard to back. Several times I've met cars and my nephews, they have got out of their car and backed my car so they could get past me. Then they go back to their car, because when it's wet and the road is slick, you will slide off the road.

They have to back up two or three times and pull up because, you know, the car will slip off the road.

Q. Do you have pot holes in the road?

A. Yes.

Q. What size?

A. We have sometimes people are afraid to go through there because the water seems so deep. I had a friend come down to my house and when she got to this place where it's a big hole, she was afraid to come through because the water was standing in the road so deep.

Q. Who uses that road?

A. Well, the King family and also the Roberts family, they use it.

Q. The Roberts family?

A. Yes.

Q. And do they live along the road, do they?

A. Yes, they live on that road.

Q. What about Mr. Lacy, does he use it?

A. Yes, he uses it.

Q. What does he use it for?

A. He uses it for his farm, to go back in his farm with the tractor and truck and cars and to feed his cows.

Q. Is the road wide enough for farm machinery to get down and pass a car?

A. No. He has to pull off wherever he can.

Q. Are you married, Ms. Owen?

A. I'm widowed.

Q. And how many years ago did your husband pass?

A. '81.

Q. How do you heat your house, by the way?

A. I heat my house by oil.

Q. Have you ever experienced any problems getting oil for your house?

A. Yes, I have.

Q. Tell me about that.

A. We had a lot of rain, and my oil gave out and I called the oil man. And he said, "I cannot come down to bring you oil because the road is too rough." He said, "I am very sorry, but I can't get in there but I'll be down as soon as I can."

Q. On that occasion did you run out of oil?

A. I ran completely out of oil, because it was several days before he could come in.

Q. Did you have any heat in your house?

A. I had a little kerosene heater and I used the kerosene heater to heat with.

Q. Do you have any trouble with the electricity or the utility people getting in?

A. Yes. They couldn't come down to read the meter because the road was so rough. They would just give us an estimation on the bill and say they would come in and read it whenever they can. They said it was no way they could get in there to read the meter.

Q. Have you ever had any need for emergency vehicles to come down to King Village that you're aware of?

A. Yes.

Q. Tell me about that.

A. When my husband was sick I called them and they said the road was — they came down once and picked him up. The next time they said the road was too rough for them to come in. Then later my husband passed out, and I called them again and they said the road was too rough. They said, "We can't come down there and get him." I said, "Please,

if you come down, just please try to come down, if you get stuck, I'll get somebody to pull you out because he has passed out and I don't know whether he's dying or what." I said, "Please, if you can come down."

MR. HOWELL: Objection, Your Honor.

THE COURTS: Go ahead.

A. He said, "We will try to come down." So then later they came down and picked him up, but before he got to the emergency room he came to.

Q. Do you know of anybody else that has had to have an emergency vehicle come down that road to pick them up?

A. Yes.

Q. Has the emergency vehicle been able to come?

A. It was a man died in my car. The road was so rough the ambulance couldn't come down.

Q. Did you try to get him to the hospital yourself?

A. So I tried to get him to the hospital. I called my brother and my husband to help get him in the car because my neighbor's wife and I, we couldn't get him in the car because he had passed out. Before he got him to the hospital he had passed.

Q. Who is Margaret Ballou?

A. That's my sister.

Q. Has she ever needed medical attention?

A. Yes.

Q. Did she have a rescue squad come get her?

A. Yes. She fell and broke her wrist and her leg. And when she called they had to send, a truck down to see if they could get down there before they could come in there to get her.

Q. Have you ever had anybody in that area on King Village Trail have a fire that needed the fire department to come?

A. Yes.

Q. Was the fire truck able to get down that road?

A. They sent a truck down. They stayed up at the top of the road.

Q. And "they" being the fire department?

A. And after the truck came down to see whether they could get in or not.

Q. All right. When you say "a truck", do you mean a big fire truck with the ladder?

A. No, a pickup truck.

Q. So the fire truck waited at the top of the road?

A. At the top of the road,

Q. Was it able to get down there to put the fire out?

A. Later it came down.

Q. Did you attend any meetings of the Board of Supervisors when they were considering the condemnation of the King Village Trail?

A. Yes.

Q. And did you advise the supervisors of this situation with your road and the things you told us today?

A. Yes.

Q. Is there a cemetery down at the end of your road?

A. Yes.

Q. Are you able to get the funeral cars down there?

A. No. When my brother passed they came to the top of the road, the hearse brought him to the top of the road, and the hearse couldn't get

down in there, so they put the body on a wagon, a station wagon, and took the body down the road to the cemetery.

MR. SLAYTON: Thank you, Ms. Owen.

MR. HOPKINS: No further questions, Your Honor.

THE WITNESS STANDS ASIDE.

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FREDDIE EDMUNDS

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Edmunds, Hank Howell here with Mr. Hopkins, representing Jim Lacy and Epps Lacy. Introduce yourself, if you would, to His Honor.

A. My name is Freddie Moss Edmunds.

Q. What's your occupation?

A. I'm a sergeant with the South Boston Police Department.

Q. Where do you live?

A. 1200 King Village Trail, Halifax, Virginia.

Q. How long have you lived there?

A. Prior to 1995, '92, '93, twenty years.

Q. Is everyone back there related by blood or marriage to the Kings?

A. To my knowledge.

Q. Do you drive your police car to and from work?

A. Yes, I do.

Q. Do you and the other members of the King family there have an easement over the road that leads to 614 from your home?

A. The easement on my road?

Q. Yeah. Do you have an easement to get from 614 to your home, do you know?

A. I have an easement on my road, but King Village is a separate road from my road. My road adjoins King Village Trail Road.

Q. I see. Okay. You've got a road from your property to the top of King Village Trail?

A. To the King Village Trail, yes.

Q. I'm talking about does everyone back there have an easement to go across to get to 614?

A. Everyone is supposed to have a prescriptive right of way.

Q. Okay, Do you maintain that?

A. Yes, we do.

Q. And how long have you maintained that road?

A. Since I've been living there I help maintain the road back to 1992, '93. Since I've been living there it has been maintained, but I can only speak on what I've been doing since 1992.

Q. What efforts have you made to maintain the road?

A. We have bought equipment, tractors, road blades, gravels, grubbing hoes, utensils for the road.

Q. Has that been periodic?

A. Yes.

Q. Are these outside contractors or did you and other members of the family do the work?

A. We done the work ourselves. We got outside contractors to deliver the gravels.

Q. And how frequently have you gone out and done work on the road?

A. We work on the road at least every month and a half.

Q. I'd like to turn your attention to around the first part of December, 2002. Do you remember the discussion about an alternative to the condemnation being just fixing up the road?

A. I know it was a conversation that took place about fixing the road.

Q. And what was your expressed position on whether just fixing up the road or the condemnation would be possible?

A. I think the issue arose that if they fix it to have a good road, that definition was never really defined as to what they mean about a good road and who was going to maintain that good road, because we had already maintained that road to the best of our abilities.

Q. Did you cut branches off the side at times?

A. Yes, we did.

Q. And did you work out the pot holes in the road and put in gravel at times?

A. Yes, we did.

Q. How much money have you put forward to buy the land?

A. Could you repeat that question?

Q. How much money has the family put forward, given to the county to purchase land for the condemnation?

A. To my knowledge to this day it has been $12,600,

Q Okay. And did you have any concerns about who would pay for this alternative to condemnation, to build it and maintain it?

A. You said who would pay for it?

Q. Yes.

A. VDOT.

Q. And did you ever offer to actually pay for building the road and maintaining it, your family?

A. No, we didn't.

Q. Are you able to do that?

A. No, we're not,

Q. Is that why you went to the board to have them do it?

A. Yes.

MR. HOWELL: Thank you.

CROSS EXAMINATION

BY MR. BAIN:

Q. Mr. Edmunds, the judge instructed us to address the witnesses by Mr., so I won't be referring to you by sergeant. Is that what you said?

A. Yes, sir.

Q. Again, what is your occupation?

A. I'm a sergeant with the Town of South Boston Police Department.

Q. Do you have any special training?

A. Yes, I do.

Q. What is that?

A. I'm on a TACT team which is the same as SWAT. I'm an assistant TACT team commander.

Q. Would you explain to the judge what duties are involved in a TACT team?

A. What consists of the TACT team is we make high entry level dealing with homicides, bank robberies. We deal with serious events, breaching houses and businesses and stuff where there's an imminent danger to the community and the citizens.

Q. As a part of your job, do you take any special equipment for this function home with you?

A. Yes, I do.

Q. And is it transported in your police vehicle?

A. Yes, it is.

Q. Have you ever had any instances or occasions when you were not able to get your police vehicle and that equipment to your house?

A. Yes, I have.

Q. Would you describe it to the Court?

A. There has been an incident where I was driving my police car early in the morning where a tractor was parked on the roadway and I had to wait over ten minutes before the subject had to move his tractor, which he took his time moving his tractor from the roadway that I had to get out into the public highway.

Q. Has there ever been an occasion when you were not able to get your car to your house?

A. Yes, it was.

Q. Would you describe that to the Court?

A. Many times during the wintertime when snow is on the roadway I had to leave my police car and walk almost nine-tenths of a mile to the top of the road and have my co-worker pick me up at the top of the road, while leaving my other equipment inside my police car.

Q. And where was the area that you parked your car? Explain to the Court.

A. About halfway in the roadway, maybe about four-tenths of a mile to the main highway. At times I have parked my car in the middle of the roadway, waiting so someone else could move a piece of farm equipment from the roadway.

Q. Does your car require any special maintenance on account of using King Village Road?

A. Yes.

Q. Would you describe that to the Court?

A. There have been several occasions where I had to take my police car to the town shop to get different maintenance done to it as to CV joints and different things that comes from the roadway.

Q. Have you ever had occasion to install any pipe or do any road work for the purpose of directing water drainage?

A. Yes.

Q. Can you describe that for the Court?

A. There has been an occasions where we had to install a pipe, not in the roadway, but it was in the ditch, to catch some of the water coming off the roadway and off the tobacco fields.

Q. Has there ever been an occasion the work you have done has been destroyed?

A. Yes.

Q. Would you describe that for the Court?

A. One morning some of the residents of King Village Trail spent all morning working on the road to find later on that afternoon that someone had pulled the pipe up with a tractor and laid the pipe in the middle of the roadway.

Q. I believe you testified on direct examination that King Village residents have a longstanding practice of putting gravel on the road?

A. Yes.

Q. And to state the obvious, what's the purpose of putting gravel on the road?

A. It's to try to help maintain the road so it won't continue to be muddy.

Q. Does the use of heavy farm equipment have an effect on the life of this type of improvements and repairs?

A. Yes.

Q. Would you describe it to the Court?

A. That road is not equipped to handle heavy equipment. It's just barely suitable just to handle just minor vehicles, but heavy equipment as in tractors, big tractors, and big trucks, it just can't handle those big trucks.

Q. Do you have any personal knowledge of occasions when emergency service vehicles were unable to reach the King Village homes?

A. Yes.

Q. Would you relay that to the Court?

A. My son was between four and five years old. My oldest son is eleven years old. My grandmother was baby sitting my son, and she had called one day and said my wife had called and said that the house was smoking, my grandmother's house was on fire, and when I came home the main fire truck was at the top of the road with the big tanker with the water inside of the truck, and as I proceeded down the road they only just had a little brush truck because I asked them why didn't they bring down the main truck and they said due to the road condition because of the weight of the water on the truck, they didn't want' the truck to overturn, because they had been there on several occasions prior to this incident.

Q. Along the length of this road that you described, are there many areas where it's sufficient for two vehicles to pass going in opposite directions?

A. Maybe when you get about one-tenth. While you're on King Village Trail up to one-tenth to the main highway it's a spot where you can actually pull over. That is only if you're familiar with the area.

Q. Have you attended past Board of Supervisors meetings?

A. Yes.

Q. Have you spoken the board and shared with them the problems that you've shared with the Court today?

A. Yes, I did.

Q. Mr. Edmunds, I'd like to deliver these exhibits to you and ask you to look at them if you will and describe what these pictures tell you.

A. These are the pictures of the road where I live on. This is the roadway. This is how the water comes down the road. You can see that this is the road. It's only wide enough just for one vehicle and how the water runs from off the fields. This is a tobacco field up here. This is where the water comes from and at the top of the road, this is the very top of the road, which is a state highway, and this is the road itself. Beyond that is where the residents live at.

THE COURT: These pictures will be marked 1 and 2 and will be admitted,

MR. BAIN: No further questions.

MR. HOWELL: I just saw the pictures, Your Honor.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Do you know when you had last done repairs to this road before the rain?

A. Yes. You can look at those pictures and you can see they've got a new grade of gravels on that road. It hadn't been too long that we had put the gravels on there prior to all that rain coming.

Q. When was the last time you had taken a bulldozer through there?

A. Within the last two months. Not a bulldozer, our tractor with the road blade on it.

Q. A road blade?

A. Yes.

Q. Have you ever taken a bulldozer down there to get out the ruts?

A. It wasn't allowed.

Q. But have you ever?

A. We had attempted to but it wasn't allowed for the people to come in and do that work.

Q. Was that only one occasion you tried to get a bulldozer down there?

A. We only tried one occasion and once we were turned away on that occasion, we did not attempt it anymore.

MR. HOWELL: Thank you.

THE WITNESS STANDS ASIDE.

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CAROLYN BALLOU

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Introduce yourself the His Honor. Tell us who you are and where you live.

A. Okay. My name is Carolyn Ballou and I live at 1184 King Village Trail.

Q. I'm Hank Howell and this is Jeremy Hopkins and we represent the Lacy family.

A. Okay.

Q. You've been involved in appealing to the Board of Supervisors to build the road back to your home, is that right?'

A. Yes, it is.

Q. Okay. Have you appeared before supervisor meetings?

A. Yes,

Q. Do you remember when there was discussion of two proposals for giving you a road, one was over the existing gravel road, and the other was down by Banister River?

A. Yes.

Q. Did you go to the board meeting and tell the board which one you preferred?

A. We attended the meetings, yes.

Q. And which one did you tell the board you preferred?

A. We preferred the existing road.

Q. As compared to the Banister Road?

A. Yes.

Q. And ultimately the board chose to condemn on the existing road, is that correct?

A. Yes.

Q. Ultimately the board did the existing road you asked for?

A. Yes.

MR. HOWELL: Thank you very much.

CROSS EXAMINATION

BY MR. BAIN:

Q. Ms. Ballou, is it your understanding that the Virginia Department of Transportation is going to improve this road, make it part of the state system?

A. That's correct.

Q. And is that what you want to happen?

A. Yes.

MR. BAIN: That's all I have.

****

DOUGLAS BOWMAN

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOPKINS:

Q. Good morning, Mr. Bowman.

A. Good morning.

Q. Will you please state your full name for the record, please?

A. Douglas V. Bowman.

Q. And your occupation?

A. Retired banker.

Q. And your address?

A. 3200 Gann Avenue, South Boston.

Q. Are you currently a board member of the Board of Supervisors for Halifax County?

A. I am.

Q. How long have you been on the board?

A. Since January of 2004.

Q. Are you familiar with what is known as the King property?

A. King Village property?

Q. Yes.

A. Yes.

Q. And did you vote to condemn property - how did you vote on the condemnation to take property and build a road for the King property?

A. I voted in favor of condemnation.

Q. So you support the condemnation?

A. Yes.

MR. HOPKINS: Your Honor, at this time I would like to move to declare this as an adverse witness. He's an opposing party and he is also in support of taking our client's property. I think it would speed up the trial.

THE COURT: Why declare him an adverse witness just because he voted for the condemnation?

MR. HOPKINS: He's also an opposing party, Your Honor. I'd like to speed up the trial.

THE COURT: He is not an opposing party. He is a member of the Board of Supervisors. The board itself is an opposing party, you objected to them being seated in the courtroom on that reason.

MR. HOPKINS: I just thought I'd speed up the trial by leading him. I understand, Your Honor.

THE COURT: If he proves to be hostile, I'll let you cross examine him.

MR. HOPKINS: Thank you. Your Honor.

Q. Can you please state whether the King family ever approached the board and asked them to take property for them?

A. They have appeared before the board.

Q. Did they ever approach you individually?

A. We had occasion to talk about it.

Q. When did they approach you regarding the King Village road?

A. I don't recall specifics, but I recall it being discussed, both during the election campaign in the fall of 2003 and also after my election and after I was sworn in as a member of the board.

Q. So they contacted you while you were running for office?

A. We discussed it in public forums where the candidates were talking about their position on various issues.

Q. Did any individual members of the King family contact you while you were running for office?

A. I did talk to some of them individually.

Q. And what did they tell you at that time?

A. They shared with me the history as they saw it on the issue of getting the road.

Q. Did they inform you that they wanted the board to take the property for them?

A. They did.

Q. Okay. And they told you they wanted the board to construct a paved road for them?

A. They said they needed a new road and in order for that to happen ten feet on either side of the prescriptive easement needed to be acquired in some form or fashion.

Q. You are aware that the board of supervisors - on behalf of the board Mr. Slayton filed a petition for condemnation to take the Lacys' property? You are aware of that petition, correct?

A. Restate that question, please.

Q. I'm sorry. Mr. Slayton filed a petition for condemnation to condemn the Lacys' property, and he did that on behalf of the Board of Supervisors. Are you familiar with that petition for condemnation?

A. Yes, I am.

Q. Do you remember the public use that is alleged in that petition?

A. No.

MR. HOPKINS: Your Honor, if I could, I'd like to approach the witness and hand him the Petition for Condemnation to refresh his memory.

THE COURT: All right.

MR. HOPKINS: For the record I'm handing Mr. Bowman the Petition for. Condemnation filed by the Board of Supervisors of Halifax County.

Q. I'd like to refer you to paragraph six of the petition, Mr. Bowman. Mr. Bowman, can you tell me what the county's alleged public use for this taking is?

A. Safe and adequate means of traveling between State Route 614 and King Village property.

Q. Does the petition say to serve the King Village property?

A. I assume it means that. It is between the state route and the community.

Q. What I'm asking you specifically, Mr. Bowman, is paragraph six.

THE COURT: I can read what it says. I don't think you need to have him parrot what it says. You can ask him about it.

MR. HOPKINS: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. Let me ask you this, Mr. Bowman. Before the board ever voted to take the Lacys' property, did you consult with the police department?

A. No, I did not.

Q. Did you consult the fire department?

A. No, I did not.

Q. Did you consult the EMS?

A. No, I did not.

Q. Did you consult anybody dealing with emergency vehicles to find out whether emergency vehicles would in fact go down the road?

A. I did not personally, no.

Q. Did you consult the Director of Transportation for the school board?

A. No, I did not.

Q. Are you aware of any accidents involving school buses or school children at the King's bus stop?

A. I was aware of the accident history as provided by VDOT. Whether it pertained to buses or not, I have no recollection of that.

Q. Do you remember I took your deposition last week?

A. Yes.

Q. Do you remember I asked you, "Are you aware of any accidents involving school buses or school children?"

A. (pause)

Q. You remember I asked you at your deposition "Are you aware of any accidents involving school buses or school children?" Do you remember that?

A. That was the question.

Q. Do you remember your answer?

A. Not specifically.

Q. Isn't it a fact that you said no, you were not aware of any accidents involving school buses or school children at the King Village bus stop?

A. How does what I said differ from that?

Q. Are you telling me right now that you are not aware of any accidents involving school buses or school children at the King Village bus stop?

A. I'm aware of accidents,

Q. But not involving school buses or school children?

A. No, sir.

Q. Are you pretty familiar with the landscape and the property in Halifax County?

A. Yes.

Q. Is it your opinion that there are hundreds of private driveways like this, like the King Village Trail?

A. I would say there are certainly quite a few others.

Q. Okay. Aren't you aware that students walk down those roads to catch the bus?

A. I'm assuming that that's the case.

Q. And the county hasn't taken any of those roads for any of those families, have they?

A. Not to my knowledge.

Q. Is it your opinion that this road would only serve the King Village residents and those that are visiting the King Village residents?

MR. BAIN: Your Honor, I'm going to object.

THE COURT: Objection sustained.

Q. Can you state whether it's your opinion that this road serves only the King Village residents?

THE COURT: It's the same question.

Q. Who will this road serve?

A. It serves primarily the King Village residents, but it would be hopefully a public road, open to anybody who happens to visit, or emergency vehicles who happen to be needed.

Q. Where does the road start?

A. Route 714.

Q. You mean 614?
A. 614.

Q. How long is this proposed road?

A. I believe it's under a mile, nine-tenths of a mile.

Q. What's at the end of the road?

A. King Village.

Q. What I'm asking specifically with regard to the construction of the road, how does it end? Does it end in a cul-de-sac?

A. I haven't seen any designs. I've been up and down the road. Yes, there are some cul-de-sacs.

Q. So you're not familiar with the road - you voted to take the Lacys' property and construct the road, but you're not aware of the construction of the road?

A. I'm very familiar with the existing condition of the road. I've been down it several times. I'm not familiar with any engineering or the design plan of the new road on the existing roadway.

Q. So all you know it starts at 614 and goes nine-tenths of a mile and ends at the King property?

A. Yes.

MR. HOPKINS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. You mention that you talked to proponents of King Village while you ran for office?

A. I did.

Q. When did you run for office?

A. It was in the fall of 2003, the November elections.

Q. Did you run on a campaign of being in favor of condemnation of this property?

A. No, I did not.

Q. You did not?

A. No.

Q. At some point you indicated you voted in favor of the condemnation?

A. When it came up at the March meeting, after I was on the Board of Supervisors I did, yes.

Q. What factor did you use in making a determination how to vote on this issue?

A. I weighed the pros and cons and it was essentially the public safety issues I gave the most weight to, applied what I considered a heavy dose of reasoning. It's certainly a debatable issue but I felt like in this case the right thing to do was to vote in favor of condemning for this road.

Q. Did you personally go out and visit the road?

A. I did on several occasions.

Q. And what condition did you see when you went out there?

A. It wasn't challenging for me, but it was dry and it certainly had a lot of ruts, and I could see some real difficult issues with emergency service vehicles or particularly inclement weather some serious public safety possibilities occurring because of the existing condition of that road.

Q. How wide is that road?

A. I'm going to say less than twenty feet wide.

Q. Is it enough room for two vehicles to pass?

A. No. I don't believe there is.

Q. To your knowledge who uses this road?

A. Principally the King Village residents and people who may be visiting them.

Q. Do the Lacys use the road for the farming operation?

A. I don't have any knowledge of that.

Q. Are there any other people who live along that road before you get back to King Village?

A. There are a couple of other residents, yes.

Q. How often did this matter come up on your agenda over the last several years?

A. Well, I can only speak from January of 2004. It came up in our February meeting. It was on our agenda -we took action at a March meeting, I believe.

Q. Did you have the benefit of a road viewer's report?

A. I did.

Q. And that process was adopted before taking the vote?

A. Yes,

Q. Were you privy to the contents of the road viewer's report?

A. Yes.

Q. Was that distributed to the various board members?

A. I wasn't on the board then. Originally when it was prepared I'm sure it was, and then afterwards we saw it, after I became a member of the board, yes.

Q. Did the road viewers propose two routes to consider?

A. They did.

Q. How did they compare economically from a cost factor?

A. Well, there's an alternative route to the existing roadway that went along the Banister River above the flood plane. The cost estimate, as I recall, was about double what it would cost to improve the

existing roadway. The burden to the county would have been something on the order of $250,000, as I recall, for the alternative route.

Q. As opposed to the existing road?

A. Yes.

Q. Let me show you this document and see if you recognize that viewers' report.

A. Yes.

MR. SLAYTON: We move to introduce this as Exhibit No. 3.

THE COURT: Any objection?

MR. HOPKINS: No objection, Your Honor.

THE COURT: The viewers' report will be marked as No. 3 and admitted without objection.

Q. To your knowledge did the Virginia Department of Transportation allow this road?

A. It did.

Q. And would the Virginia Department of Transportation take over the road once the process was completed?

A. The existing road, yes,

Q. And it would be a public road?

A. Yes.

Q. During your time on the board when this issue came up for vote, did you hear concerns about emergency vehicles or other vehicles being able to get down to King Village residents?

A. I certainly knew from discussions about this issue that that had a potential to be a public safety problem. I didn't hear of any specific instance that I was personally directly aware of but it was a potential that I could easily see happen.

Q. Was that commented on by the viewers to your knowledge?

A. Yes, it was.

MR. SLAYTON: Thank you.

REDIRECT EXAMINATION

BY MR. HOPKINS:

Q. Mr. Bowman, you say you are familiar with the road viewers' report of August 12, 2003, correct?

A. Yes.

Q. Are you aware of what that report says about emergency vehicles?

A. It said either route would correct the public safety issue.

Q. Are you aware that that report says it would afford significant convenience to the King Village residents? Is that what the report says?

A. I would have to read the report.

MR. HOPKINS: Your Honor, if I could hand the report to the witness. For the record, I'm handing the witness the report of August 12, 2003.

THE COURT: Show him where you are talking about.

Q. Beginning at paragraph three. Specifically looking at the first sentence, Mr. Bowman, what does the report say that this road would do?

A. It says either road project would afford significant convenience to the King Village residents.

Q. Okay. Now, look at the last sentence of that same paragraph. Doesn't the report say that emergency vehicles did use the existing King Village access road?

A. It does. It continues "The adverse road surface conditions could make existing King Village access road unusable under certain weather conditions. It would be less likely for either road projects."

Q. But yet you never consulted any of the emergency departments?

A. No, I did not.

Q. If you could turn to page one of the report, please, Mr. Bowman. One further question. I'm sorry, two more questions. On page one I'm looking at what is labeled as paragraph one or section one. I'm looking at paragraph two of section one. What does the road viewers' report say this road will serve? Who will the road serve, according to the report?

A. The road will serve the needs of the residents of King Village.

Q. And Mr. Bowman, one last question. If you could turn to page six, please. I'm looking at section nine, paragraph three of section nine. With regard to safety, what do the road viewers say would be the existing condition after the construction of this road?

A. On the issue of safety, the road viewers would also point out that since school buses which now stop at the intersection of Love Shop Road/Calvert Road with the existing King Village access road would, after construction, still have to enter either Love Shop Road or Calvert Road at a very low rate of speed. The risk of other vehicles colliding with such school buses will not be eliminated and may not be significantly reduced.

MR. HOPKINS: Thank you, Mr. Bowman. That's all I have.

EXAMINATION BY THE COURT:

Q. Mr. Bowman, are you aware of how many houses or homes this road would serve?

A. I believe there are about fifteen homes.

Q. Does that include the homes that you mentioned that also connect to it?

A. I think there are a couple of homes that are along the road before they actually technically get into King Village, is my understanding. Fifteen total, give or take though.

THE WITNESS STANDS ASIDE.

(RECESS)

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LOTTIE NUNN

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOPKINS:

Q. Please state your full name for the record.

A. Lottie Tucker Nunn.

Q. And your address?

A. P. O. Box 178, 6187 Red Bank Road, Virgilina, Virginia.

Q. And you are currently a member of the Board of Supervisors for Halifax County?

A. That's correct.

Q. Are you familiar with what is known as the King property?

A. I am.

Q. And you are familiar with the condemnation to construct a road to that property?

A. I am.

Q. To your knowledge did the board ever discuss any other option, other than condemning property for the King property?

A. Yes.

Q. What did they discuss?

A. There was an alternate route discussed. There was some discussion of fixing the existing road, to the best of my knowledge.

Q. When you say fixing the existing road, you mean you will now provide maintenance on the existing road?

A. Make it a little wider and putting gravel on it.

Q. So it's your opinion that if the road were properly maintained then it would provide . . .

MR. SLAYTON: Your Honor, that's a leading question.

THE COURT: Objection sustained.

Q. Can you tell me what effect it would have to go down and grade the road like you just told me?

A. I live down a dirt road. We do our own. We make it higher than the sides and we put gravel on it.

Q. And is it your opinion that the King family could have done the same thing with their road?

A. I think it would have been an improvement over what was there.

Q. Ms. Nunn, before the board voted to condemn the Lacy property, did the board ever contact any of the emergency departments to discuss emergency vehicle access?

A. Not that I'm aware of, but I read in the paper where they may have difficulty getting down the road.

Q. But the board never discussed that with the emergency departments, such as fire and police?

A. Not that I'm aware of.

Q. Are you familiar with the list of viewers? When I say viewers, I'm referring to the road viewers.

A. Yes.

Q. Do you know where that list came from, the list of names? Do you know who provided that?

A. I'm not sure whether they volunteered or whether they maybe they were picked from one side . . .

MR. SLAYTON: I'm going to object on the grounds of relevancy.

THE COURT: She said she doesn't know.

MR. HOPKINS: That's all I have, Your Honor.

CROSS EXAMINATION

BY MR. SLAYTON:

MR. SLAYTON: Your Honor, may I approach the witness with an exhibit?

THE COURT: Yes, you may.

Q. You testified on direct examination that you were aware of efforts to acquire property for a road prior to the action to condemn, is that correct?

A. Yes.

Q. Are you familiar with the document I just handed you?

A. I have probably seen it before,

Q. As you read that to refresh your memory, do you remember this all being discussed by the board?

A. Yes, I remember.

MR. BAIN: Your Honor, I'd like to offer this into evidence.

THE COURT: What is this?

MR. SLAYTON: This is a letter addressed to me as attorney for the Board of Supervisor. It's signed by James lacy and his wife and Epps Lacy and his wife offering to donate property along the existing road we're talking about right now so can be taken into the state system.

THE COURT: Any objection?

MR. HOPKINS: No, Your Honor.

THE COURT: It will be marked as the board's next exhibit and admitted.

Q. Are you familiar with the contents of the letter?

A. Yes.

Q. The Lacys withdrew the offer?

A. Yes.

MR. SLAYTON: I'd like to offer this into evidence, Your Honor.

THE COURT: It will be marked as the next exhibit and will be admitted.

REDIRECT EXAMINATION

BY MR. HOPKINS:

Q. These letters Mr. Slayton has just sh'own you, those refer to the Laoys trying to work out an alternate location you referred to earlier, correct?

A. Right.

Q. And do you remember any of the King family showing up at the board meetings?

A. Yes.

Q. And addressing the alternate location?

A. I remember them showing up at the meetings.

Q. Do you remember which location they preferred, the alternate route or the existing route?

A. I'm not sure.

RECROSS EXAMINATION

BY MR. SLAYTON:

Q. I believe you answered Mr. Hopkins by saying that letter addresses the right of way to the alternate route, the route along the Banister River, is that correct?

A. That's correct.

Q. Directing your attention to the second page, the first paragraph addresses the utility relocation, the second, the cemetery is affected by the larger easement. Is that in fact improvements that were to be made in connection with building the road along the existing right of way?

A. It's my understanding — I've been down this road and there are some grave sites down there that would have to be moved.

Q. And is it true that there are some farm fences along the existing road the have to be relocated?

A. Yes.

Q. And is that addressed in this letter as well, in the third paragraph on the second page?

A. It addresses the graves. It addresses fences also.

Q. The first paragraph addresses utility location, is that correct?

A. That's correct.

Q. So do you now believe that this is additional right of way along the existing road as opposed to the alternate road?

THE COURT: Mr. Slayton, the letter speaks for itself.

EXAMINATION BY THE COURT:

Q. Ms. Nunn, how did you vote on the condemnation?

A. Judge Alexander, I don't believe in taking anyone's land, so I voted against it.

MR. HOPKINS: One follow-up question, Your Honor.

REDIRECT EXAMINATION

BY MR. HOPKINS:

Q. In your opinion, Ms. Nunn, why did the board take this property? Why did they condemn the Lacys' property?

MR. SLAYTON: Your Honor, I object.

THE COURT: She can say what her intent was.

A. As I said, I don't believe in taking anyone's land.

THE WITNESS STANDS ASIDE.

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RONNIE VAUGHAN

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOPKINS:

Q. Mr. Vaughan, will you please state your name for the record?

A. Ronnie Dale Vaughan.

Q. And your address?

A. 1226 Blane Road, Alton, Virginia.

Q. And you're currently a member of the Board of Supervisors for Halifax County?

A. That's correct.

Q. And you're familiar with the King property, what's known as the King property?

A. I am.

Q. And you're familiar with the condemnation of the Lacys property to build a road to the King property?

A. I am.

Q. How did you vote?

A. I voted no.

Q. You voted no, not to take the Lacys' property?

A. That's correct.

Q. What's the purpose for this road?

A. What's the purpose of the road?

Q. Yes. What's the purpose of the proposed road?

A. To give better access into the King Village.

Q. To benefit the King family and their property?

THE COURT: They're your words. Let him put his words.

Q. You say to provide better access. Better access to the King Village residents?

A. That's correct.

Q. And you're familiar with the road itself?

A. I am.

Q. Do you know of anyone else who would use this road, other than the King Village residents or people visiting the King Village residents?

A. Not to my knowledge.

MR. HOPKINS: That's all I have, Your Honor.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. Mr. Vaughan, are you aware of any other houses along this road other than the King Village residents?

A. I think it's two additional houses along that road stretch.

Q. Are you aware of any business activity that's conducted on property owned by the Lacy family?

A. Agricultural business.

Q. Do you know any reason why the board voted to condemn this right of way as opposed to the alternate route?

A. One more time, please, sir.

Q. Yes, sir. Do you recall any statements made before voting to condemn the right of way on the existing road as opposed to condemning the right of way along the Banister River, so called alternate route?

A. It was discussed. I think part of the reason against the alternate route was the cost, but I do not believe that was condemning that land. I think the Lacys were offering that land.

Q. But cost was an element that you heard expressed?

A. Yes.

Q. Had you at board meetings heard concerns voiced by the persons that use this road with the difficulty in inclement weather conditions and emergency services response?

A. That's correct.

MR. SLAYTON: No further questions.

THE WITNESS STANDS ASIDE.

WILLIAM FITZGERALD

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION BY MR. HOWELL:

Q. Mr. Fitzgerald, were you a member of the Board of Supervisors at the time that votes were made on condemning the Lacy property for the King Village Road?

A. Yes, I was,

Q. And how long have you been on the board?

A. Three years, nine months.

Q. Were you there during the big public hearings on the property in 2002?

A. Yes.

Q. Do you remember Reverend Ford speaking?

A. I remember Reverend Ford, as well as others. I don't remember the specifics of each person that spoke. As I recall, everyone that spoke was - no one spoke in opposition of support for getting a new road.

Q. To your understanding how would the King family benefit from condemning this and building a road?

A. It's my opinion that the families that live down King Village Trail would benefit as well as the public, including the Lacys would benefit from the public road.

Q. Would they be able to get their farm equipment across the state maintained road?

A. Yes. I'm told by the . . .

Q. Do you know personally?

A. I only rely on information given to me and I spoke to the resident engineer and he assured me that.

Q. He's not here, is he?

A. I don't see him here.

THE COURT: Wait a minute. That's not hearsay. He can tell why he believes that. That's not being offered for the truth of it.

MR. HOWELL: As long as it's not being offered for the truth, Your Honor, that's fine.

A. I spoke to the resident engineer and he told me that the Lacys in their operation would be improved by the better road.

Q. Did you talk to James Lacy or Epps Lacy as to their opinion?

A. I did not.

Q. Did you review the letters that were given to the board concerning problems they had?

A. Which letters are you speaking of, sir?

Q. Exhibit 5. Did you ever see that?

A. I did.

Q. Okay. Did you see where they said at the end there about how it would affect the farm operations?

A. I did.

Q. How much is it going to cost to build this road for the King family?

A. It was not built for them, sir. It's a public access road that's being built by VDOT.

Q. How much will it cost to run a road from 614 over that easement area?

A. VDOT had estimated it at, I believe, $190,000. That has been set aside for that purpose.

MR. HOWELL: Thank you.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. Mr. Fitzgerald, you have been present this morning, have you not?

A. Yes.

Q. You heard it suggested on direct examination that the board somehow was motivated by race. Did that consideration enter into your decision?

A. It did not, sir.

Q. If you would, explain to the judge what did enter into your thinking concerning this condemnation?

A. Since I've been on the board there has been an effort to improve the conditions of the road. At one point the county had been offered through letters from the Lacy family to donate the necessary land to improve the road. Several months after the letter the county received indicating they would donate the necessary land to improve the road, a letter came that said that they withdrew their offer, even though the original letter had, I think, seven, eight or nine stipulations along with the letter that had to be complied with in order for the county to proceed. The county was prepared to proceed and accept under those conditions. However, I concluded that the only way this road was going to — I believed the only way that this road was going to be built by the Virginia Department of Transportation was that the board had to take the action which it took.

Q. Is it your understanding the board solicited the offers in an effort to be able to guarantee the right of way to VDOT to improve this road?

A. Yes, it was.

Q. And with the ultimate goal of taking this road into the state system?

A. Yes.

Q. Mr. Fitzgerald, at this point is there a commitment from the Virginia Department of Transportation to improve this road and accept it into the state highway system?

A. It is, sir.

Q. If the county can guarantee the right of way?

A. Yes, it is.

Q. Do you know, Mr. Fitzgerald, is the funding in place for that?

A. I'm assured by the resident engineer that the funding is in place to construct the road.

Q. Is the funding that is in place, Mr. Fitzgerald, state or local funds?

A. State funds.

Q. And is that funding made available as part of a practice throughout the Commonwealth?

A. It is.

Q. Do you know if the name of the program is the rural addition program?

A. I'm not sure of the exact program, but the resident engineer has assured me that the funding is available to construct the road once the legal procedures are complete.

Q. There was some reference made and questions asked about offers from the Lacy family to donate right of way along what is referred to as the alternate route, the route along the Banister River. Are you familiar with that?

A. Yes.

Q. Are you familiar with the conditions and terms of that?

A. I understand the Corps of Engineers has title to the land and it was almost double the cost to construct a road along the Banister River where the viewers had indicated as an alternate proposed route, and I saw no way through the county administrator at the time and our delegate, we saw no route for obtaining any funding to support that alternate route.

MR. SLAYTON: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. I hand you this document and ask have you seen that before?

A. Yes, I have.

Q. Does that three-page document represent the offer of the Lacy family to consider donating right of way for an alternate route along the Banister River?

A. Yes, it is.

Q. And is it three pages in length?

A. Yes.

Q. In part because of the conditions attached to that?

A. Yes.

Q. It's a firm commitment to donate if a number of conditions are satisfied?

A. It's a commitment to donate if these conditions are met.

Q. As evidenced by exhibits previously entered in the record today, had the Lacy family previously suggested they might be willing to donate the needed right of way along the existing road?

A. They did.

Q. Have they later withdrawn their offer?

A. They did.

Q. Did you have any reason to believe that this offer would be withdrawn?

MR. HOWELL: I object, Your Honor.

THE COURT: It's in evidence it was withdrawn. I know it's withdrawn. I saw the letter.

Q. You favored the existing road over the alternate road, is that correct?

A. That's correct. The cost factor was a major consideration.

Q. Is it correct that March 1, 2004, is the date on which the Board of Supervisors voted to proceed' with a condemnation of the right of way along the existing road?

A. Yes.

Q. At that time, Mr. Fitzgerald, did the board have in hand financing adequate to construct the road along the alternate route?

A. We did not.

Q. At that time, Mr. Fitzgerald, did the board have through VDOT funds adequate to build a road along the existing road?

A. Yes, we did.

Q. Would you state to the Court what your motivations were when you concluded it was a public need for this road in King Village as opposed to private benefit for them alone?

A. The primary factors was the safety and welfare of the residents as well as the public having access to that area to serve the citizens in that area.

Q. Mr. Fitzgerald, there have been a number of questions asked this morning to establish that there may be other roads in the county situated like the King Village Road. Have you heard that testimony?

A. Yes.

Q. Is that a correct statement?

A. There may be other roads in the county. I'm not aware of - I'm personally not aware of any road' that has that number of residents and the road is as terrible of condition as this road. There very well may be some roads that are dirt roads that go to residents, but the condition of the road and the number of residents, in my opinion, that is the only one in the county.

Q. Did you personally go and take a look at the road we are talking about?

A. I've been down there several times, including a time when a storm was going on.

Q. On that occasion what did you observe?

A. I observed water running across the road and it simply made trenches across the road, which I had to cross in a truck. I had to cross those trenches as water flowed across the road. At the bottom of the road it puddled to an area where the trucks had to go through standing water.

Q. Mr. Fitzgerald, under the state's rural addition program, is the county afforded unlimited funding for rural addition or is that a finite amount?

A. I believe it's the latter.

Q. Is it the board's responsibility to prioritize which of the roads in the county should be improved first under that program?

A. It is.

Q. And you see that as your duty as a legislator, is that correct?

A. Yes.

Q. And is it your intent to do what you thought was in the best interest of the county in using that money?

A. Yes, sir.

MR. SLAYTON: That's all I have.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Fitzgerald, you said race did not play a factor in your decision?

A. No, sir.

Q. The majority of your board is white?

A. Six to two.

Q. Six to two?

A. Yes, sir.

Q. Is that despite the fact - do you remember that people accused the board of race being a factor in the decision?

A. Yes, sir. I'm speaking of the board and the board' s motivation in making a decision. It was never discussed by me in none of the meetings that we had of the board the race issue. It is what it is. The residents are predominantly minority and the board is not. It's what it is." I can tell you that this board has never got into the race issue. It's a citizens' interest, public need for the citizens of this area. That was the primary concern for this road.

Q. Is it your understanding it was a family subdivision back then?

A. I'm not familiar what it is, sir. All I know is there are residents.

Q. So you don't know who lives back there and the relations?

A. I don't know the relations.

MR. HOWELL: Thank you.

THE WITNESS STANDS ASIDE.

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TOM WEST

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. You are Tom West?

A. Tom West.

Q. I'm Hank Howell. Jeremy Hopkins and I represent the Lacys here. Were you on the board of supervisors at the time that the board considered condemning the property of the Lacys for King Village Trail?

A. Yes, sir.

Q. Why did the board take the property?

A. Why did they take the property?

Q. Yes.

A. To build a road as I understand.

Q. For whom?

A. It would be a public road.

Q. Where does it go to?

A. It goes into King Village.

Q. Okay. Were you present at the vote?

A. No, sir.

Q. So you didn't vote one way or another?

A. No, sir.

Q. Have you been out to the road?

A. Yes, sir.

Q. You see that there's a road back there?

A. There's a road, yes, sir.

MR. HOWELL: Thank you.

MR. SLAYTON: No questions.

THE WITNESS STANDS ASIDE.

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JAMES EDMUNDS

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Edmunds, Hank Howell here representing the Lacys with Jeremy Hopkins. Were you on the Board of Supervisors of Halifax County at the time that the votes were taken relating to the condemnation of the Lacy property for King Village Trail?

A. Yes, sir.

Q. And did you vote for it?

A. Yes, sir.

Q. Have you been out to what's there now by way of the road?

A. Since the condemnation?

Q. At all?

A. Yes, sir.

Q. You have been out there? Did you go all the way to the end and visit the people down there?

A. I didn't visit the people but I drove to the end of the road.

Q. What's down there?

A. It's a couple or three houses. The road terminates into a couple of driveways.

Q. Were they all houses or some trailers?

A. I think it was a house trailer or a double wide and some houses. It has been several months ago since I was out there.

Q. Did you make it down the road?

A. Yes.

Q. Now, what's your understanding of who' will benefit from constructing this road?

A. The general public, especially the residents.

Q. Especially the residents who live down the trail? Is that what you said?

A. Yes, sir.

MR. HOWELL: That's all I have.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. Are you aware of any other houses that are located along this road?

A. Yes.

Q. Did it appear to you those houses make use of this road as well?

A. Yes, sir.

Q. Are you aware of any agricultural activity that's conducted by the Lacy family along this road?

A. Yes, sir.

Q. Does it appear to you that they make use of this road as well?

A. Yes, sir.

Q. Are you familiar with the source of funding for this road through the rural addition program?

A. Yes, sir.

Q. To the best of your knowledge is there money available now in that program to improve this road when the county acquires the right of way?

A. Yes, sir. That was the motivating factor.

Q. Is it correct on March 1, 2004, the board voted to proceed in this condemnation hearing?

A. Yes, sir.

Q. At that time were there funds available to the board to construct a road along a so-called alternate route?

A. No, sir.

Q. Was the issue of race involved in your decision in this matter?

A. No, sir.

MR. SLAYTON: That's all I have.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. You said race didn't play a factor in your role. Did you hear people appearing before the board accusing the board of racial bias in this decision?

A. Did I hear people accusing the board?

Q. Yes.

A. Yes, sir.

Q. Was that frequently?

A. Yes, sir.

MR. HOWELL: That's all I have.

THE WITNESS STANDS ASIDE.

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WILLIAM CLAIBOBNE

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Claiborne, state your name, if you would.

A. William Brandon Claiborne.

Q. We met earlier. Hank Howell representing the Lacys here. Are you now on the Board of Supervisors of Halifax County?

A. Yes, I am.

Q. When were you elected?

A. I was elected in November of 2003.

Q. Before you were elected, did you - are you familiar with who lives down at the end of King Village Trail?

A. Yes, I am.

Q. Have you actually done deed work related to that?

A. I think I've done one deed.

Q. Are all the people down at the end there related by marriage or blood?

A. As far as I know.

Q. You met a lot of them though?

A. Yes.

Q. Before you were elected to the board, did you appear and speak to the board on behalf of getting a road for the King Village residents?

A. I made a statement I think at one meeting.

Q. What did you tell the board before you were elected?

A. Basically I told them that I had seen the road, and I said I wouldn't take my pet down that road.

Q. When you got on the board you voted for the road?

A. Yes, I did.

Q. Did you ever talk to the King family members about their improving the road?

A. No, not really.

Q. Since you have been on the board, have people improved private roads for subdivisions and then dedicated them?

A. On the road issue I think we have.

Q. Since you've been on the board?

A. Yes.

MR. HOWELL: Thank you.

CROSS EXAMINATION

BY MR. BAIN:

Q. How long have you lived in Halifax County?

A. All my life with the exception of going to school.

Q. Were you familiar with King Village Trail before you became a member of the Board of Supervisors?

A. Yes.

Q. Have you had occasion to travel down that road?

A. Yes, I have,

Q. Have you had occasion to travel down that road in various degrees of weather?

A. Yes.

Q. What did you observe about the road?

A. I observed it was deplorable. They called it a road but all I called it was dirt. It really wasn't passable, especially when the weather was bad.

Q. During the meetings did you ever hear people tell you of the difficulties with emergency vehicles getting down the road?

A. Yes, I have, on numerous occasions.

Q. Do you remember what emergency vehicles?

A. Rescue vehicles, basically in terms of them going down to pick up people who were sick. I think I heard an instance of a funeral hearse.

MR. HOWELL: This isn't being offered for the truth of the matter?

THE COURT: No, sir.

Q. Again, these are the things that were told you by either proponents or at the Board of Supervisors meeting?

A. That's correct.

Q. Are you familiar that this matter was referred to viewers by the board?

A. Yes.

Q. And was that report turned into the board?

A. It was turned in before I became a member of the board.

Q. Are you familiar with that?

A. Yes, I am.

Q. Did you vote for?

A. Yes, I voted for.

Q. What factors did you consider in casting your vote?

A. Well, it's a little different for me. I guess I'm approaching from a legal standpoint. I listened to all the issues, and in my own mind it was the public need for the highway versus by the private ownership. And when looking at all of the factors involved with this road, I came to the conclusion the factors balanced in favor of voting for condemnation.

Q. You believe it will serve the public good?

A. Yes, I do.

Q. And will serve the public purpose?

A. Yes.

MR. BAIN: Thank you.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Did you consider the viewers' report?

A. Yes, I did.

Q. Did Freddie Edmunds give the list to the Board of Supervisors?

A. What's that?

MR. BAIN: I object.

Q. Where did the list of viewers come from?

A. I'm not sure.

Q. You don't know?

A. No, I'm not sure. I wasn't a member of the board at that time.

THE WITNESS STANDS ASIDE.

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JAMES WILLIAM WAGNER

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOPKINS:

Q. Please state your full name for the record?

A. James William Wagner.

Q. And your address?

A. 260 Poplar Lane, Halifax.

Q. And what is your occupation?

A. I'm now retired. I was Director of Transportation for Halifax County Schools.

Q. When did you hold that position? What years?

A. The transportation position started in January, 1986 and ended June 30, 2005.

Q. What did your duties include as the Director of Transportation for Halifax County Schools?

A. I was in charge of overseeing the interviewing and hiring school bus drivers and development of routes.

Q. So you are familiar with the bus routes in Halifax County?

A. Yes.

Q. Are you familiar with the bus stops in Halifax County?

A. Well, since that time they've changed, but I was acutely aware of many of the stops.

Q. Are you familiar with the bus stop at the King Village Trail?

A. Yes.

Q. How long has it been there?

A. I don't know that I can say. Certainly as long as I was in transportation. I remember the school bus stopping there.

Q. So to your knowledge then it has been there at least since 1986?

A. I think so, yes.

Q. Are you aware of any accidents involving students or school buses at that bus stop?

A. I'm not aware of any, no.

Q. Do you know what the school board policy is as far as buses going down private roads?

A. The policy is that school buses travel state maintained roads.

Q. So they would not go down private roads?

A. No.

Q. Are there many bus stops that are located at the end of the private road where students catch the bus?

A. Yes, there are.

Q. Would you say probably hundreds?

A. There are a multitude of private roads in the county.

Q. How do students get to the bus stop, students that live on a private road? How do they get to the bus stop that's located on a public road?

A. Some walk, some are transported by their parents. If the private road is very long, some parents bring them to the main road and they will wait there in cars.

Q. Is this common practice in Halifax County?

A. It's fairly common.

Q. I know you said you are not aware of any accidents at the King Village bus stop. Are you aware of any accidents regarding students or school buses along Route 614, what is known as Love Shop Road and the other side is Calvert Road?

A. At this time I can't recall any.

Q. Are you aware of any problems at the King Village bus stop?

A. I'm not aware of problems per se. I know there is a bus stop warning sign.

Q. The school system, they would never put a bus stop in a location they deemed unsafe, would they?

A. No. They try to locate them as safely as possible.

Q. Can you tell me a little bit about how the school system would address — if the bus stop becomes unsafe, what are some of the measures the school system would take to address a bus stop that all of a sudden is deemed unsafe?

A. Sometimes a bus stop can be moved a few feet for more sight distance. We work closely with the highway department to cut say tree limbs to afford more sight distance. With a recommendation of the highway department put up bus warning signs or bus stop ahead so many feet.

Q. Let me ask you this. Did the Board of Supervisors of Halifax County contact you regarding the school bus stop at the King Village Trail?

A. As I recall, I was not contacted by anyone from the board concerning that. I was actually contacted by a person from the highway department.

Q. Did you share with him the same information you shared with me today?

A. As I recall, he said there was concern and so what I did was to look at it and then go back to him with the recommendation that yes, perhaps it does need to be studied for sight distance.

Q. But until he contacted you, there was never an issue of safety at the King Village bus stop?

A. No. I mean there has always been concern. One of my previous drivers expressed concern about the stop.

MR. HOPKINS: Thank you, Mr. Wagner.

CROSS EXAMINATION

BY MR. BAIN:

Q. You say one of your previous drivers had expressed a concern about the stop located at King Village Trail?

A. As I recall, but that was several years ago.

Q. Have you been out to the King Village Trail yourself?

A. Yes.

Q. Is that road about ten or fifteen feet wide, as it intersects 614?

A. I couldn't say how wide it is.

Q. Have you ever seen cars parked along there at the time the children were picked up on the bus?

A. Yes.

Q. Okay. They just park along either side adjacent to the road?

A. Yes.

Q. Did Mr. Fitzgerald talk to you at all about what it would take to get the bus down the road? Did you have any conversations with him about the trail itself?

A. I don't recall any specifics that we may have talked about. I know he was very concerned that the matter be worked out amongst the parties. He was very concerned about it. I may have told him my concerns about the width of the road and so forth.

Q. And what were your concerns about the width of the road?

A. Simply that it was not wide enough to support school bus traffic. The bus could not go down there.

MR. BAIN: Thank you.

THE WITNESS STANDS ASIDE.

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GERALD LOVELACE

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Lovelace, if you would, introduce yourself to us. I'm Hank Howell, with Jeremy Hopkins represent the Lacys. If you would, please, introduce yourself.

A. Gerald Lovelace.

Q. Your position with the county is what?

A. I'm assistant county administrator.

Q. What duties do you have relating to subdivision ordinance and its administration and enforcement?

A. I am one of the subdivision agents designated by the Board of Supervisors.

Q. And what are your duties as the subdivision agent?

A. Primarily to review subdivision plats and the process of subdividing land as individuals wish to do so.

Q. Are you familiar with the King family subdivision at King Village Trail?

A. Yes.

Q. How are you familiar with that?

A. I grew up in the neighborhood, so I know the property down there, but I'm familiar with this particular issue because of the Lacy condemnation authorized by the Board of Supervisors and subsequent events from that.

Q. Have the Lacys written to you over some period of time about their concern about the subdividing going on at King family property?

A. Yes. There was, I believe, an April, 2005, letter raising some issues concerning it.

Q. Do you remember receiving a letter from Mr. Slayton on behalf of the Lacys back in the '80s?

MR. SLAYTON: For the record, this is a different Mr. Slayton.

Q. Frank Slayton.

A. I don't recall it off the top of my head, but yes.

Q. A letter from Mr. Frank Slayton, you think you got that?

A. Probably so. I don't recall that specific letter.

Q. Did that refresh your recollection relating to how long they might have been raising the issue of the subdivision by the King family?

A. Yes.

Q. Is it fair to say it has been going on for a long time?

A. Yes.

Q. And does the subdivision by the King family, their property there in the King Village Trail, come under the subdivision ordinance of the county?

A. Yes.

Q. Are some of the subdivisions they've done exempted from the subdivision ordinance?

A. Under our ordinance family partitions are exempted from the normal standards of the ordinance.

Q. Have they partitions just among their family members down there?

A. To the best of my knowledge, yes.

Q. Are there some in-laws down there, to your knowledge?

A. There would be.

Q. Have you taken a look at the title work for transfers in that area for the King property?

A. Some of it.

Q. Do you know who lives down there now?

A. I know some of the people who live down there.

Q. Are they all members of the King family?

A. To my knowledge, yes.

Q. Within subdividing parcels what is the limitations on who they can convey to within the family property?

A. Under our ordinance we limit family subdivisions to what we define as immediate family.

Q. Who is that?

A. That would be parents, grandparents, children, grandchildren, brothers, sisters, in-laws and steps are also included.

Q. To subdivide and transfer outside of the immediate family, does the subdivision ordinance require a state maintained road?

A. No, it does not.

Q. The access road to a subdivision and it's not family, what does the subdivision ordinance require?

A. Under the current ordinance it does require a road built to secondary standards of the Department of Transportation. Under current ordinance.

Q. So if someone now in the King property wanted to subdivide, convey out of the family, they would need a road that met state standards?

A. That is correct.

MR. HOWELL: Thank you.

CROSS EXAMINATION

BY MR. BAIN:

Q. What issues did the Lacys raise with you in their April, 2005, letter?

A. They questioned whether or not the subdivisions - I believe there were eight of them - they questioned whether they were in compliance with the county ordinances in effect at the time.

Q. And based on your investigation did you conclude they were in compliance?

A. There were a number of them that I did not sign off on as required by our ordinance. Other than that procedural aspect of it, the technical standard of the ordinance appeared to be met,

Q. Now, many of these deeds happened many years ago?

A. Correct.

Q. Back as early as 1979?

A. Correct.

Q. Has the ordinance changed from '79 to the present time?

A. Yes.

Q. When was the first time you defined family member pursuant to county ordinance?

A. I'm sorry, ask that again.

Q. When was the first time that family was defined in the county ordinance, to the best of your knowledge?

A. That would be — in the specific language it would have to be in the mid '80s.

Q. And the definition of what is considered the family in the 1980s?

A. Yes.

Q. And what was that family?

A. The ordinance specified that it would be parent, child, grandparent, grandchild, brother, sister, immediate families.

Q. Did you respond to the Lacys as a result of that letter? Did you make a response as a result of your investigation?

A. The April letter?

Q. Yes.

A. I did not make a response to them myself, no. The letter was given to legal counsel and that is part of this process.

MR. BAIN: That's all the questions I have at this time.

REDIRECT EXAMINATION

BY MR HOWELL:

Q. Has the subdivision ordinance been pursuant to the Virginia Planning Act of the Code of Virginia?

A. Yes.

MR. HOWELL: That's all I have.

THE WITNESS STANDS ASIDE.

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JOHN E. GREENBACKER, JR.

the witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Greenbacker, Hank Howell here, if you would, for the record, state your name and occupation.

A. My name is John Greenbacker, Jr. I'm a lawyer.

Q. Do you have a practice in Halifax County?

A. Yes.

Q. As part of your practice, have you done title work examining the properties of the King family at the end of the King Village Trail?

A. The descendants of James Thaddeus King.

Q. James Thaddeus King. Okay. In your analysis did you determine whether a parceling of the property to descendants of Thaddeus King was in conformance with the subdivision ordinance of Halifax County?

MR. BAIN: Judge, I would object to him giving an opinion at this point. He's not qualified as an expert.

THE COURT: The objection is sustained. You have to qualify him as an expert.

Q. Do you do real estate work in Halifax County?

A. On occasion I do.

Q. Are you licensed to do real estate work in Halifax County?

A. I'm licensed to do it in the Commonwealth of Virginia as an attorney.

Q. And that includes Halifax County?

A. The last I checked.

Q. Have you done title work as part of your practice while working in Halifax County?

A. That's right.

Q. Did you serve in a capacity in Halifax County as a public official?

A. For sixteen years I was the DA here.

Q. As part of your practice must you be familiar with the ordinances of the county?

A. Some of them.

Q. Are you familiar with the subdivision ordinance of Halifax County?

A. That's something I've looked at very closely.

Q. And have you looked at the transfers and the conveyances by title among the descendants of Thaddeus for the property in the King Village Trail?

A. Yes.

MR. BAIN: Objection. He's asking for an opinion.

MR. HOWELL: He is licensed to practice as a lawyer in real estate and title work.

THE COURT: Let's voir dire him.

CROSS EXAMINATION

BY MR. BAIN:

Q. Mr. Greenbacker, you said you were sixteen years as District Attorney?

A. Right.

Q. What years were they?

A. 1988 through - I'm trying to think - 2002.

Q. 2002?

A. Yes.

Q. Were you full-time Commonwealth's Attorney?

A. I was.

Q. As full-time Commonwealth's Attorney did you do any civil practice?

A. Only in a very limited sense. Sometimes we did asset forfeitures.

Q. But no title or real estate?

A. Real estate was not a factor except to the extent in asset forfeitures sometimes you would have to establish a title to determine what the assets were that were subject to seizure and forfeiture, but that was very rare.

Q. Now, I take it you have gone into private practice since you stepped down as Commonwealth's Attorney?

A. That's right.

Q. Is your practice primarily a criminal practice representing criminal defendants?

A. No. It's mostly civil work, civil litigation.

Q. You say you have on occasion real estate practice. How many closings do you do in a month, would you estimate, in the last twelve months?

A. Last twelve months, maybe two.

Q. So it's not frequent?

A. No, it's not.

Q. And the two real estate closings you've done in the last year, did you do the title examination or did you get a title examiner to do it?

A. No. I did it myself.

Q. All right. Let me get back to before last year, let's go two years out. Did you do title examinations two years before as opposed to the last twenty-four months? How many would you have done?

A. I'm trying to think now. You know, there are only a handful. If I made more than five I'd be very surprised.

Q. Would it not be true that a normal real estate practitioner may do as many as five in a week?

A. Yes, probably. If that's what the practice consists of. There are some of them that do that many.

Q. Can you tell me how many times the Halifax County subdivision ordinance has been amended since 1965?

A. Since '65? No, but if you look at the - this is just an estimate. I think it has probably been somewhere between twenty and thirty times because there have been individual changes that were made.

Q. And during the time that you were Commonwealth's Attorney from '88 to 2002, did you deal with the subdivision ordinance?

A. No, I was never asked to prosecute anything on it. No one certainly ever came to me and said that they had a problem with a violation.

MR. BAIN: Judge, that's all the questions I have. We do not feel this is enough to establish Mr. Greenbacker as an expert in real estate. He does two closings or two titles in the last year, maybe five in the last twenty-four months. If they are seeking to qualify him as an expert in real estate, they haven't met the burden. He's a lawyer in the State of Virginia. I don't have any problem with stating that, but his practice for the last sixteen years until 2002 was strictly criminal,

THE COURT: What do you want to ask him?

MR. HOWELL: Has he determined who owns the property down at King's Village.

THE COURT: The chain of title.

MR. HOWELL: The chain of title and in determining the relationships, do they come under immediate family definition under the ordinance.

THE COURT: I'm going to let him testify to that, over the objection.

DIRECT EXAMINATION

MR. HOWELL (continuing):

Q. How many of the conveyances have not been in compliance with the immediate family exemption provided in the governing . . .

THE COURT: Are we talking about the immediate family exemption as it exists today or as it existed some other time?

MR. HOWELL: All along. During the transfers.

THE COURT: Are you asking at the time of the transfer if he looked at the definition of exemption and determined at that time whether it was in compliance or not?

MR. HOWELL: Yes, Your Honor.

THE COURT: Make it specific to your question.

MR. HOWELL: Yes, Your honor.

A. I've identified seven. There's an eighth that's somewhat questionable, but I'm not going to include that.

Q. All right. And how many transfers have not been in conformance with immediate family?

A. In the main the problem here . . .

Q. Existing at the time of transfer.

THE COURT: Answer his question. Make the question specific.

Q. I just want to ask how many transfers were not in conformance with the immediate family exemption at the time of transfer?

A. Seven.

Q. Okay. And what are the relations to which the transfers have been made who don't qualify as immediate family?

A. You have to look at the definition, and the definition was set forth in the Virginia Code and sometimes put into the local subdivision ordinance, and there is a specific definition of who qualifies for a family exemption. These are limited to the legally defined - natural and legally defined offspring, spouse, grandchild, grandparent or parent of the owner. Now, the problem is that in the main the vast bulk of these seven conveyances are conveyed to children and their wives or their spouses, whether it's a wife or a husband. The way I see it ....

THE COURT: You're saying because a conveyance is to a child and his wife, that makes it not in the family exemption?

A. That's right, sir.

MR. HOWELL: That's the way the ordinance is written - that's the way the state code is written, Your Honor. It does not identify in-laws, Your Honor. There are some nephews, Your Honor.

A. If you look at the statute, it mentions a spouse, but the spouse that the conveyance is made

to that is exempt is only the spouse of the person who is making the donation, the owner. If they had intended to include in-laws, they would have specifically put that in.

Q. Are there some nieces and nephews that don't come under - that received parcels that don't come under the exemption?

A. Let's see here.

Q. Or any other relation that doesn't come under, other than in-laws?

A. Judge, part of the problem is we're operating on depositions here that came in. We have a 1990 sale of seven acres by Louella King, the widow of Willie King, to her son, Roberto and his wife, Sharon Maultry King. My understanding is that Roberto is the ....

MR. BAIN: Objection, unless he lays some foundation.

THE COURT: I agree. This is his understanding.

A. My understanding is based on depositions that were taken in this case, sir, where family members were placed under oath.

THE COURT: You may ask specific questions, whether or not any of these conveyances were to nieces or nephews.

MR. BOWELL: Or stepchildren.

A. All right. Stepchildren, two conveyances, one in '91, one in '98 to Willie James Stephens, Jr. and his wife, and my understanding is that the family connection of that is that Willie ....

MR. BAIN: We're going to object. If he can say what the relative is that's okay but . . .

THE COURT: You've got to be able to say who the relative is and if Willie James Stephens is a nephew or something, fine. He's got to be able to say that. If he can't say that, he can't testify.

Q. Did you review the sworn testimony . . .

A. I did review the testimony

Q. . . .as to the relation? Is that something that someone would rely upon in determining family relations within your field?

A. Yes. Statements made by family members under oath, sure,

MR. BAIN: Again, I object. He has no personal knowledge of this. If they want to introduce something outside . . .

THE COURT: Wait a minute. A family tree is obviously hearsay, but that's also admissible as an exception to the hearsay rule, is it not?

MR. BAIN: Not to my knowledge.

THE COURT: What he's testifying to is that he has reviewed, I assume, depositions.

MR. HOWELL: Sworn testimony.

THE COURT: Of family members, and if that is in fact true, then I'm going to let him testify. If he's basing it on sworn testimony of family members that this person is a niece or nephew, then that's okay.

A. Sharon Stephens is, according to Edith Owen's deposition, the stepdaughter of Willie Darnell, who is a -actually his name is Wilbur Darnell, but they call him Willie Darnell Martin, and that is the grantor's - Willie is the nephew of the grantor, Velma Ballou, and the lady who is the recipient of these two people is the stepdaughter, according to Edith Owen's testimony, of Willie Darnell or Wilbur Darnell Martin. The husband, Willie James Stephens, Jr., is a stranger in the sense the only connection he has is he is married to the nephew's stepdaughter.

Q. Is Mr. Freddie Edmunds related by blood or marriage to the King family?

A. By marriage.

Q. And how much property out there does he have an interest in?

A. He has an undivided one-fourth interest in 10.61 acres and he also owns a separate one-acre tract.

MR. HOWELL: Thank you, Mr. Greenbacker.

CROSS EXAMINATION

BY MR. BAIN:

Q. I'd like to go over the deeds that I didn't quite understand, but I'm looking at your pleadings which you have filed for a hearing this afternoon. You cite a 1979 gift of deed, Velma King Martin to Willie Darnell Martin and wife, and that's 1979.

A. That's right.

Q. Twenty-six years ago.

A. Right.

Q. Is it correct that Wilbur Darnell King is the son of Velma King Martin? That's what you alleged in your petition you filed,

A. That's right.

Q. Your belief is it violates the county subdivision ordinance because his spouse was included on that deed?

A. That's correct.

Q. Now, under the subdivision ordinance at that time, was there a definition of family?

A. There is no specific definition of family. The definition comes from the Virginia Code.

Q. What section are you citing in the Virginia Code to define family?

A. Hold on. This is the statute as it was back then. 15.1-466.

Q. And what section, is that under, please?

A. This is subparagraph thirteen. Just to read a portion of it: "For the purpose of this subdivision a member of the immediate family is defined as any person who is a natural or legally defined offspring, spouse, grandchild, grandparent or parent. The provisions of this subdivision shall apply only to subdivision ordinances adopted by the counties and the City of Suffolk."

Q. Are you saying they only apply to the City of Suffolk?

A. No. "The provisions of this subdivision shall apply only to subdivision ordinances adopted by the counties and the City of Suffolk."

Q. So the county had not defined what the family was in 1979?

A. They talked about immediate family.

Q. Do you have that ordinance? I have a copy of the one in 1985.

A. Taking it back to '76 with a couple of amendments because we are dealing with 1979

conveyances, and the only reference here is that under "subdivide" which is a definition that appears in - and this is a county code citation 15-3. Okay? Under "subdivide" it says "To divide any tract, parcel or lot of land into two or more parts and the term to subdivide shall not include a bona fide division or partition of agricultural land for agricultural purposes or for the building site for members of the family owning any of the agricultural lands, nor any division of land which may be ordered by the Circuit Court." So you're dealing with this clause here that says "for members of the family", and that's not further specified that I can see, but for obvious reasons the power to adopt the subdivision ordinance being derivated from the state, they would be limited by the definition that appears in the Code of Virginia.

Q. So if this conveyance had been to just her grandson, it would have been fine?

A. That's right.

Q. And you believe it's not fine because the conveyance said to his wife as well?

A. That's right, because if they had intended to put in-laws, they would have said that. The only spouse that is mentioned as being exempt is the spouse of the owner.

Q. And when you say "they", do you mean the General Assembly?

A. That's right.

Q. So there is no definition by the county in the county ordinance?

A. That's right, but the county's power to do this is a grant from the state.

Q. In 1979 if it was not a conveyance to a family member it would have required approval of the county agent?

A. I believe so, sir. I'll tell you what the section is.

Q. So again, your concern is that the county didn't have a chance to look at the plat before it was recorded?

A. Primarily, because the whole scheme, the regulatory scheme does not function unless these conveyances are submitted to the county agent to make sure that they are in conformity, what they're proposing out there is in conformity with the subdivision ordinance. Now, if they are exempt, he would have to make that determination too.

Q. Would it be fair to say that this is a technical violation if the plat had not been previously submitted and approved by the county but in all other respects it complied to what the county required?

MR. HOWELL: Your Honor, I object to the term "technical."

THE COURT: Objection overruled.

A. I wouldn't say that it was technical because each deed has to be taken a look at.

THE COURT: If it was in fact a conveyance to a family member as the code defined, and it just hadn't gone to the subdivision agent, is that not a technical violation? That's the question.

A. I would say it probably is.

Q. Let me follow up with the second deed you cited, which is also a 1979 at 437-811.

A. Right.

Q. From Velma King Martin to Reginald Dexter Martin, son and daughter-in-law, so Reginald is Mrs. Martin's son.

A. That's right.

Q. So it would be in the same objection you had?

A. Same objection.

Q. Okay. Now, the next one that I see is 1990, which you allege is from Louella King to her son, Robert, and his wife Sharon Maultry King.

A. My understanding from Mrs. Owen's testimony is that Robert, or Roberto as it appears in the deed, is the son of Alphonso.

Q. Did you not cite in your pleading that you filed in this Circuit Court that Robert is a son? Let me show this to you.

A. You don't need to show it to me. I have to go on what this lady said in her sworn deposition.

Q. But you filed this?

A. That's right.

Q. You signed it,

A. That's right.

Q. But you are now saying it's not right?

A. Based on what I've heard since then, no.

Q. And if he wasn't her son, once again, what should have happened was that they should have taken the plat to some county official for approval.

A. That's exactly right.

Q. All right. Let me move on and ask you about – let me skip ahead. The 2000 deed that you referred to as 479-451, Leon King to Charmain Edmunds.

A. Which one?

Q. That's the most recent. It's 479-451.

A. Yes, sir.

Q. Your pleading cited eight deeds but your testimony said seven.

A. That's right.

Q. Is that not excluded?

A. That's not excluded, yes, sir.

Q. But that's not an issue?

A. That's not an issue.

Q. Let me ask you then about 694 page 326, Derek Ballou, et al to Willie and Sharon Stephens. Are you aware that that plat was admitted to the county for approval and approved by the appropriate official?

A. No, sir. 694-326?

Q. Yes, sir.

A. I see a stamp on the plat.

Q. That was approved?

A. Based on that, I'd say yes.

Q. So that would not be at issue?

A. Yes, sir.

Q. Now, let me take you to the deed at 578-748, 1992, Margaret K. Ballon to Sherman and Anita Hawkins.

A. Margaret K. and Henry B.

Q. Yes, sir. 578-748. Are you aware that one of the grantees is a grandchild?

A. According to Mrs. Owen, yes. There is a covered family member in that conveyance. It's a grandson, yes, sir.

Q. So that would be eliminated?

A. It wouldn't be eliminated. It's a non-covered spouse,

Q. I'm sorry. It's the same objection you had in the '79 conveyance.

A. That's exactly right.

Q. 643-541.

A. Same thing.

Q. So again, grandchild covered, just didn't get the spouse, which would have required approval by the county?

A. That's right.

Q. Let me ask you about 568, I think the last one, 149. Derek Ballou to Willie and Sharon

Stephens. Are you familiar, of your own personal knowledge . . .

A. 568?

Q. I'm sorry. I may have misspoken.

A. Well, I've got a 568 here but page - is that 149 you said?

Q. Yes, sir.

A. Yes. Okay. What's the question?

Q. What is the relation there?

A. Based on Edith Owen's deposition, Sharon Stephens is the step-grandchild of Wilbur Darnell Martin.

Q. So I guess where I am in the family tree, you are relying on Mrs. Owen's deposition and you have a copy of that?

A. Page 17, I believe. Sharon is Darnell's stepdaughter. Answer, yes.

Q. Darnell is not a grantor?

A. That's right. He's not the grantor of that deed. It comes from Velma King Ballou.

Q. Do you have a copy of the deed, 568-149?

A. Hang on just a minute and I'll pull it up.

THE COURT: What are you trying to establish now?

MR. BAIN: Judge, I'm trying to establish whether his testimony we got here it's in violation of the subdivision ordinance because they are not family members, whether in fact that is correct or not.

THE COURT: Mr. Greenbacker, if you'll answer that. I thought he testified it was in the deposition and gave you the page number.

MR. BAIN: When he read the deposition he said a different name for the grantor.

THE COURT: Do you have the deposition?

MR. BAIN: I do not. He's the one claiming it's true.

A. This one says that the conveyance is by Derek Ballou and Patricia Ballou to Casey Ballou, Anthony Ballou and Willie James Stephens and Sharon Stephens.

Q. I guess the question I'm asking you, does Mrs. Owen define the relationship between the grantors and the grantee in deed book 558-149?

A. I don't know that she was asked that question.

Q. Okay. And likewise I'm asking the same question as far as 557-739. Was that defined?

A. Which one?

Q. 557-739, Louella King to Robert King.

A. Is the relationship defined?

Q. Louella King and Robert.

A. Sharon Maultry King and Roberto King, is that defined in the deed?

Q. Well, you've alleged in your pleading that he is the son of the grantor. I'm asking is there anywhere that you see in Mrs. Owen's deposition that he is not the son of the grantor, Louella King?

A. Is your reference to Louella King?

THE COURT: He's asking you a question. He's not asking you for a reference. He's asking you a question,

A. What deed?

Q. 557-739, Louella King.

A. Louella King to Sharon Maultry.

Q. What you allege in your pleading is her son Robert and his wife.

A. Right. Well, he's not the son, according to this lady, the statement on page 18 of her deposition it says here that Sharon - the connection here is that Sharon is Darnell's stepdaughter.

Q. Yeah, but what about Robert? Robert is what you allege as the son of Louella. That's what you alleged in your pleading.

THE COURT: We are not getting anywhere.

MR. BAIN: let me move on.

THE COURT: Let's move on and move on quickly. Let me ask you one question. Have you done a family tree of the King family?

A. I have not done a family tree of them, sir. That would be extremely difficult to do.

Q. But it would be extremely important, would it not?

A. Probably in the end, depending on who is saying - what one person's testimony is to another, it would easier to follow.

THE COURT: A family tree would be easier to follow?

A. Yes, sir,

Q. Of the eight that you filed in your pleadings today, sir, one you agreed was misinformation, so we're down to seven, and one

other one we agreed that' the county approved the plat. We're down to six,

A. That's right.

Q. And the remaining six you have objection to because they went to family members but they included the spouse?

A. Right.

Q. And the plat should have been approved?

A. Right.

Q. And two others we're not quite sure of. One you think from the deposition is not a family member and one you're not convinced. That would be the remaining six.

A. Basically,

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Are you able to say one way or the other if the agent would have approved including an in-law?

A. I don't know what the agent would have done.

Q. If the person related to Thaddeus King died, what would happen to that person's share if they were owning with an in-law under these deeds?

A. It would have to go to the surviving spouse.

MR. HOWELL: That's all.

THE WITNESS STANDS ASIDE.

****

(RECESS FOR LDNCH)

J. D. BARKLEY, II

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOWELL:

Q. Mr. Barkley, Hank Howell, with Jeremy Hopkins we represent the Lacys here. I understand you have done some work on adding the King Village Trail to the secondary road system in Halifax County.

A. Yes, sir.

Q. What is your role at VDOT?

A. My title today is residency administrator, effective July 1st. It used to be resident engineer. Now it's Halifax Residency Administrator.

Q. In what capacity were you involved in adding the King Village Trail to the secondary road system?

A. The Department of Transportation is structured whereas the resident engineer, the old title, works with the local Board of Supervisors with their secondary construction funds, and in their secondary construction funds program there is a provision for rural additions; that is, roads that are not in the state system. I began working with the Board of Supervisors around 1980 in their endeavor from the citizen request for that road to be added to the state system. So that's the background of VDOT's involvement with this request.

Q. And is your determination about whether to add the King Village Trail into the secondary road system governed by VDOT's Guide for Additions, Abandonments and Discontinuance for secondary systems?

A. Yes, sir.

Q. Does section 33.1-712 relating to taking certain streets into the secondary system also govern VDOT?

A. Yes, sir.

Q. Under 33.1-79.1 does that section apply to streets being added to the system?

A. I can't recall 79.1.

Q. 73.1 and 72.1, I'll hand that to you.

A. That's it.

Q. And does that section govern your decision about adding the King Village Trail to the secondary road system?

A. This section and the VDOT Transportation Board Policy.

Q. Is that in the Guide for Additions and Abandonments?

A. Yes, sir.

Q. If you would, help me. Where in the guide is that? There's a flow chart.

A. Yes, sir and the flow chart is confusing to me. I'll try to talk you through it if you want me to.

Q. Okay.

THE COURT: Let's don't talk through it. Let's get to it.

MR. HOWELL: Yes, Your Honor.

Q. If you might help me, just to be sure, the first question comes under the CTB. And is CTB BAP?

A. Commonwealth Transportation Board.

Q. And the RAP?

A. Rural Addition Policy.

Q. Okay. And then there's a second wave comes in under 33.1-72.1. That's the Code of Virginia. For a street to come into the secondary road system and for funding to be made available under VDOT funding, it has got to come under one of these sections?

A. One of those sections.

Q. Okay. And for a road to come under that, it must be a street?

A. Well, a road is just a road.

Q. Right. There is this definition under 33.1-72.1. Is that the definition of street to determine whether a road comes into the system and funding is made available?

A. If I can read it, I'll try to explain it the way I interpret it. Street means a street or highway shown on a plat which was recorded or otherwise open to public use prior to July 1st, at which time it was open to be used by motor vehicles, which for any reason has not been taken into the secondary

system. This road in our review over these twenty years has been - it falls under the RAP program, the Rural Addition Policy Program.

Q. Okay. And that's in this flow chart about streets?

A. Yes, sir, the rural addition policy.

Q. Okay. Is the rural addition policy definition of street the same as 72.1 that governs streets coming into the secondary system?

A. I think street and road are interchangeable to me.

Q. The code section for street - is the policy contrary to the code section?

A. No, sir.

Q. So the code section definition for street is consistent with the rural addition policy definition for street? They wouldn't be different, would they?

A. I'm not exactly following your question.

Q. I'm just saying that the code section defines street. Does the rural addition policy follow the code section?

A. The rural addition policy is in this manual also.

Q. Does it define street?

A. If I can flip to it. Is this the whole manual?

Q. That's all that VDOT provided.

A. It's right here, "Rural Addition Policy" on page 28. This is the part that this road qualifies for from VDOT's review.

Q. And that is for streets coming into the system?

A. Yes, sir.

Q. And is there a definition for street in that?

A. They refer to proposed roads to provide sufficient public service to warrant expenditure of highway funds for maintenance, a minimum of forty-foot right of way.

Q. Okay. But in your opinion does that refer to streets under 72.1?

A. Under my opinion I call it a road, and I would also call it a street.

Q. Tell me what are you referring to in this section here?

A. Right here at the beginning. Proposed roads. Where the proposed roads provide sufficient public service. That's the part.

Q. I see. Right. Okay. So that is different than the street under 72.1?

A. You can take roads under both sections.

A. Okay. But in our case you didn't go under 22.1-72.1?

A. I think we considered that also.

Q. Okay. So was the taking under that also?

A. I don't have my file with me, but I think we mainly referred to both sections.

Q. Both sections?

A. Yes, sir.

Q. In your file?

A. Yes, sir.

Q. Okay. And is your action based on your having authority under both sections?

A. Yes, sir.

Q. Now, can a road to a family subdivision be added into the secondary road system? Do you have any provisions on roads going to family subdivisions?

A. The county ordinance has family subdivisions not required to be in their subdivision ordinance. This road was not considered a family subdivision, eliminated it from consideration.

Q. Okay. The rural addition policy, does that allow a road for a family subdivision to be incorporated?

A. Yes, sir,

Q. It does?

A. Yes, sir,

Q. Where does it allow it?

A. It's a road that has not been in the state system that is eligible for - since it meets the criteria for rural addition. That means it serves three or more publicly owned and occupied dwellings. It falls in that category,

Q. And so it doesn't involve family subdivisions. There aren't any provision relating to family subdivisions?

A. No, sir.

MR. HOWELL: Thank you very much.

CROSS EXAMINATION

BY MR. SLAYTON:

Q. How long has your file been open on the King Village Trail?

A. In preparation for this court case I looked at the file, which is about five inches thick, and the earliest document I see was on a yellow legal pad dated 1980. The earliest tvpewritten stuff is 1983.

Q. In the period of time from 1980 to the present, which is about twenty-five years, have you been involved with the King Village Trail issue throughout that period of time?

A. Yes, sir.

Q. Did you, Mr. Barkley, participate with the road viewers?

A. I was an ex officio member of that. I'm not listed as a member of the road viewers but I participated in the meetings.

Q. Did you as a result of attending the road viewers' meetings, develop an understanding of the issues related to this road?

A. Yes, sir.

Q. Would that be true based on your experience with the Department of Transportation?

A. Yes, sir.

Q. Are there, Mr. Barkley, a number of conditions preceding which have to be satisfied before accepting the road in the system?

A. Yes, sir.

Q. When that point is reached, is the road then assigned a state highway number?

A. Yes, sir.

Q. What is the state number for secondary roads?

A. Any number over six hundred.

Q. Has the King Village Trail at this point been assigned a state road number by the Virginia Department of Transportation?

A. VDOT from my office, in anticipation 'of a restriction of the Board of Supervisors being able to utilize rural addition funds, effective July 1st if their ordinance was not in effect in compliance with the rural addition program, they could not use rural addition funds, so we worked with the Board of Supervisors, the board passed a resolution asking VDOT to accept this road contingent upon the right of way being made available, in order that the board could use the funds they had accumulated in the rural addition account for the King Village road. So we submitted the rural addition assembly to our local assistance office in Richmond and they assigned a road number to King Village of Route 959, held in abeyance until the right of way issue is

solved. So rural additions, as I mentioned in the earlier cross examination in part was fine, the fact that three separate owned and occupied dwellings are required to be considered. The next criteria is that the right of way be available and be free of utilities and encumbrances, such as fences. Those issues have not been addressed, but I think y'all are in the process of doing that, so VDOT has approved, provided those contingencies are met, this road.

Q. So what you just said, VDOT has determined that all the requirements have been satisfied except to guarantee the right of way and the utilities that would interfere with construction.

A. And to add to that, the environmental considerations that VDOT does now to make sure that everything is met in those regards was approved for the road in place for the nine-tenths of a mile.

Q. So that further strengthens the process, does it not?

A. Yes, sir.

Q. In the rural addition program, is it correct that the locality is entitled to set aside a certain percentage of the state allocation for road purposes for rural additions?

A. Yes, sir. The limit is five percent of the construction funds available.

Q. Is there, Mr. Barkley, a set ceiling that can be hit? Is that another requirement?

A. There is also another maximum mileage limitation of one and a fourth percent of the miles of the county secondary system, which is approximately eight hundred and forty-eight miles, that they cannot exceed per year..

Q. So under this program there are two limiting factors the county can expect; one that the county can't spend more than five percent of the county allocation, and second, no more than one and a fourth percent of the length of the highway system, is that correct?

A. That's correct.

Q. Have you, as a result of your position in the entire time you've served here as resident engineer for this county, have you participated in Board of Supervisor meetings?

A. Every year.

Q. You do that on an annual basis?

A. Yes.

Q. As part of that six-year plan, is that when the supervisors decided to set aside money for rural addition and if so how much?

A. Yes, sir.

Q. That's a requirement of state law that they do so, is that correct?

A. That's correct.

Q. Or they can do so, subject to those two limitations. In this county, Halifax County, has there been set aside money for rural additions?

A. Yes, sir. The board has historically allocated anywhere from thirty to fifty and most recently ninety-four thousand dollars to the rural addition account. That account is currently around three hundred thousand dollars in the account for rural additions.

Q. And that' s the account for Halifax County?

A. For Halifax County.

Q. As a part of your duties, have you established a budget for construction and improvement for King Village Trail road?

A. The money is in the rural addition account. It's not set on King Village, but it's in that account.

Q. In your experience over the years, Mr. Barkley, did the demand for road improvements and road additions in the county exceed available funds?

A. Yes, sir.

Q. If there were unlimited funds available, would your regulations permit you to upgrade all the standards on all the roads?

MR. HOWELL: Objection. It's speculative, Your Honor.

THE COURT: Objection sustained.

Q. I'll this question. The requirement for roads exceeds the available funds?

A. The demand exceeds the available funds.

Q. Is it therefore a legislative responsibility and duty to determine which of these many demands are satisfied?

MR. HOWELL: Objection to commenting on the General Assembly what they're doing, Your Honor.

THE COURT: Objection sustained.

Q. Mr. Barkley, at this point have the criteria been satisfied? VDOT is committed to improve this road, is that correct?

A. VDOT has the request. They've assigned a number, provided the right of way utilities are clear.

MR. SLAYTON: No further questions. Thank you.

REDIRECT EXAMINATION

BY MR. HOWELL:

Q. Is that telephone and electricity?

A. Yes, sir. Any utilities of any type, be it cable TV or telephone or power or encumbrances, such as fences or buildings, anything that was in the right of way.

Q. In this particular right of way are there utilities based on your inspection?

A. Yes.

Q. What utilities are in there?

A. I believe there's telephone and some power.

Q. And they are going to have to be condemned and moved?

A. They will have to be placed under permanent - if they stay in the forty-foot right of way and moved, to allow construction. Then they can be put back. VDOT allows utilities within our right of way, and I think that's the plan, to try to relocate utilities within the right of way.

Q. Has that happened?

A. No, sir. That is part of the requirements of our acceptance.

Q. Will the power company and the telephone company have to agree to that?

A. No, sir. Somebody would have to compensate them for it, but they would have to move them.

Q. Is that provided for now? That compensation, has that been provided for?

A. I couldn't answer that. Not from VDOT. We will not spend money on utility relocations.

MR. HOWELL: Thank you.

THE WITNESS STANDS ASIDE.

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D. EPPS LACY

a defendant, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. HOPKINS:

Q. Good afternoon, Mr. Lacy. Would you state your name for the record?

A. Dan Lacy.

Q. And your address?

A. 1225 Love Shop Road, Halifax.

Q. And what is your occupation?

A. Self employed as a farmer.

Q. Where do you farm?

A. I farm land that's jointly owned by all members of our family on Love Shop Road, Route 614.

Q. So part of the land you farm is owned by your dad?

A. My father, my brother and myself, and my mother.

Q. How long have you farmed this land?

A. Some of this land has been farmed for generations. I've been farming it for a long time.

Q. Are you familiar with what is known as the King property?

A. Yes.

Q. And where is that situated, the King property, in relation to your property, or the property that's farmed by you?

A. The King property is behind one of the farms that we own and farm.

Q. Just to make the record clear, it's behind the property owned by your brother James and your father?

A. That's correct.

Q. How long have the Kings lived there?

A. There have been some homes there as long as I can remember.

Q. And how do the Kings get to their property?

A. They use the driveway through our property.

Q. Do you know when this driveway was created?

A. It has been there as long as I have a recollection of it.

Q. And they've been using it as long as you can remember?

A. As long as I can remember.

Q. Who maintains the driveway?

A. The Kings maintain the driveway.

Q. Why?

A. It's their way in and out of their property.

Q. When you say they maintain it, what have they done to maintain it?

A. They have put gravel on it. They have pulled the road up, as we s y, road blade. They've cut brush away from the side of the road.

Q. Have they ever approached you or your father to purchase land from you?

A. Yes, they have.

Q. When did they do this?

A. They've done it several times over the years. I would say back into the '80s. The most recent time was in September of 2002 by letter.

MR. HOPKINS: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q. For the record, this is the letter?

A. A certified letter to my father.

Q. Who is this letter from?

A. It's from the residents of King Village, I think is the way it's addressed. It's from 1200 King Village Drive.

Q. And you still have the certified envelope in which it came?

A. Yes.

MR. HOPKINS: Your Honor, if I could, I'd like to admit this letter into the record.

MR. SLAYTON: No objection.

THE COURT: It will be marked as Defendants' 1 and will be admitted without objection.

Q. Mr. Lacy, what was your family's response to the Kings' offer to buy the property?

A. We told them we didn't have any land for sale.

Q. What did the Kings do after you did not sell them the property?

A. They approached the board and asked the Board of Supervisors to condemn our property.

Q. Did they do anything else?

A. They organized certain members of the community to put a lot of pressure on members of the Board of Supervisors to vote for condemnation. And they also organized I know of a march from the church to the meeting of the board to bring pressure on the Board of Supervisors.

Q. Who was involved in that?

A. I wasn't there. I understand the NAACP was involved in it.

Q. We are here today, so the board ultimately decided to take the property.

A. To condemn our property.

Q. The property that the board is taking, is that the same property that the Kings offered to buy?

A. Yes.

Q. Do you have knowledge of any other driveways in Halifax County that are similar to the Kings?

A. I think there are probably hundreds of driveways in Halifax County similar to the Kings'. There are several around my driveway that are very similar to that.

Q. What is your driveway like?

A. My driveway is a gravel driveway to my house about four-tenths of a mile.

Q. And how about your brother James?

A. His is probably three-quarters of a mile dirt and gravel driveway to his house,

Q. Who maintains those driveways?

A. I maintain my driveway. I spent four thousand dollars last year maintaining my driveway. My brother maintains his driveway. My father maintains his driveway.

Q. How do you maintain it?

A. I grade it, I put rock and gravel on it.

Q. Are you familiar with the bus stop at the end of the Kings' driveway as it connects with 614?

A. Yes, I am.

Q. How long has it been there?

A. It has been there as long as I can remember.

Q. So the children, how do they get to their bus stop?

A. They either walk or someone brings them.

Q. You have a son too, right?

A. I have a fifteen-year-old son.

Q. Does he catch the bus along 614?

A. He catches the bus on highway 614, at the end of my driveway.

Q. He walks down the driveway?

A. He walks down the driveway or I'll bring him down the driveway.

Q. With regard to the bus stop at the Kings' driveway, have there ever been any accidents involving the bus or school children?

A. Not that I'm aware of.

Q. Are you familiar with the school bus route along 614?

A. Yes, I am.

Q. Are there many stops along 614 that are at private roads?

A. Yes, there are quite a few stops.

Q. Do students walk down private roads and catch the bus at those stops?

A. Students walk down the private roads all over the county to catch the bus.

Q. Are you aware of any accidents involving students or school buses along 614?

A. No, I'm not.

Q. Has school bus safety along 614 or at the King bus stop ever been a public issue?

A. Not to my knowledge it has never been a public issue until we refused to sell land to the Kings.

Q. What effect would this road have on your property, on your farm?

A. Right now it's very hard to say what effect this is going to have because we farm for a living, Your Honor. Our fields up here are very small. We tend to have to contour the fields to shape of the land to get the proper drainage. We have one field that when they improved 614 in the mid 1980s that we've been working on for twenty years to get water to drain since they improved Highway 614. It changed the elevation. I can take you out there right now and show you the area as big as this front room right here where we've had tobacco crops drown because we can't get the water to properly come out of it. This is not only taking land, we're talking about some drainage easements on this land. It has been my experience in seeing how VDOT does some of their drainage easements, they drop it off the road a little ways and then they just let it go down on your property. I have some small fields that I feel like will be totally ruined by this easement, some of these drainage easements. The elevation is another problem.

Q. Let me stop you right there. How many drainage easements are they taking?

A. I think there are six, or five, something like that.

Q. And with regard to elevation or change in grade, did the Board of Supervisors when they filed their petition for condemnation, did they attach any document showing the change in elevation or the change in grade?

A. No.

Q. With regard to emergency vehicles, have you ever seen emergency vehicles go down the Kings' driveway?

A. Yes, I have.

Q. Which emergency vehicles?

A. I've seen a police car go down just about every day and I have seen sheriff's cars go down the driveway.

Q. When you say a police car every day, what are you referring to?

A. One of the residents is a police officer for the Town of South Boston. He drives his car to work.

Q. Have you ever seen any other emergency vehicles?

A. I know last year, 2004, I saw a fire truck go into the Kings' driveway. I don't know how far down it went.

Q. Are you aware of any emergency vehicles going down private roads in Halifax?

A. Yes, I am. If emergency vehicles didn't go down private roads probably a large portion of Halifax County would never get served by emergency vehicles.

Q. Let me ask you this. As far as getting down a road, with the change in grade on your property, will you be able to get your farm equipment across the road?

A. Probably not. They will probably have ditches and some kind of access to fields. The biggest problem I've seen in elevations, not being able to get our land to drain. That's the way we make our living.

Q. And of course, I assume you are familiar with the subdivision of the Kings' property?

A. Yes, I am.

Q. And what is your understanding of this subdivision?

A. I understand it's a violation of the county code.

MR. SLAYTON: Objection.

THE COURT: Sustained.

MR. HOPKINS: Your Honor, I should be able to ask him in his opinion. I'm laying the groundwork, Your Honor.

THE COURT: His opinion of what?

MR. HOPKINS: I'm going to get to that in the next question, Your Honor.

THE COURT: What he understands is a violation is not. . . .

MR. HOPKINS: Let me ask it this way.

Q. Mr. Lacy, have you ever informed the county of your concerns that the subdivision may be in violation of the zoning ordinances?

A. Yes, I have.

Q. When did you do that?

A. We've done it numerous times since 1980. I have a letter right here which was written to Gerry Lovelace in 1980 regarding some of the trailers going into this land, and we've spoken to probably every county administrator about this since 1980, and we've spoken to the assistant administrator several times. The last time we spoke with Joe Morgan. I believe it was in 2003, the county administrator at the time.

Q. To your knowledge have they taken any action?

A. None that I'm aware of.

Q. Have you ever offered to help the Kings upgrade or maintain the road?

A. Yes, I have.

Q. When did you do that?

A. We've done it several times over the years. The last time was in November of 2002 when we met with Mr. Slayton there. Mr. Fitzgerald was there. A road builder was there. The assistant administrator was there. Some of the residents were there. Some of the news people were there.

Q. What did you offer to do?

A. We all walked down the road and the road builder explained . . .

MR. BAIN: Excuse me. I object on the ground of relevance.

THE COURT: What is the relevance?

MR. HOPKINS: Your Honor, this goes to necessity. It goes to the right to maintain the road, that there are ways other than condemnation. It's under the definition of public use under 15.2-1900, the taking has to be necessary to achieve a public purpose. This goes to the necessity, it goes in

conformance with some of the testimony that this is not necessary.

THE COURT: Objection overruled.

Q. What did you offer to do?

A. At that particular time we had walked down the road and we were willing to pay a share of improving the whole length of the highway - the whole length of the driveway from the state highway 614 to the property line,

Q. And how did the Kings respond?

A. They were not interested in that. They wanted a paved driveway.

Q. Were there any other times when you helped with maintenance of the road or offered?

A. We have put some gravel down on our own and in the '80s we have had other road builders down there who had equipment down and asked if they wanted to share in the cost of improving any portion of the road and the answer would always be no, that they didn't have the money and they wanted a paved road.

Q. "They" meaning the Kings?

A. The Kings, right.

Q. Can you tell me whether your family ever offered other land for an alternate route?

A. Yes, we did.

Q. And what was the board's response to that?

A. Evidently the board voted to condemn the existing right of way. The board did not find that suitable. We had offered this in good faith. I don't think the board ever ratified it, to be honest with you.

Q. Are you familiar with the road viewers list?

A. Yes, I am.

Q. Who provided that list to the county?

MR. BAIN: Objection.

Q. Do you know who provided the list?

A. I saw a list that came from Freddie Edmunds.

Q. How did you get that list?

A. I think I went over to the county administrator's office and asked for it.

MR. HOPKINS: Thank you, Your Honor. That's all I have for now.

CROSS EXAMINATION

BY MR. BAIN:

Q. Mr. Lacy, did you all talk to the Board of Supervisors about the condemnation?

A. Have I talked to any of the supervisors? About the condemnation, no. I discussed the whole issue with some of the members of the Board of Supervisors.

Q. You lobbied them to not condemn it or take the alternate route?

A. Not really.

Q. How about any other members of your family, they didn't speak to any supervisors about that?

A. We spoke to supervisors about that we did not think it was proper to condemn our land,

Q. Tell me what the condition of that road is.

A. It's passable.

Q. Take a look at those pictures that are there on your left and tell me if they actually depict the road.

A. What was the question again?

Q. Do those pictures reflect the condition of the road?

A. Not at all times, no.

Q. Meaning when it's not raining?

A. When it's not raining it doesn't.

Q. How about when it is raining?

A. I've seen water running down the road, the driveway.

Q. And you all run farm equipment down that road?

A. Yes, we do.

Q. In connection with your operation. Are there a couple of Roberts families who live on the road?

A. Yes.

Q. Your family initially offered to donate this road to the county and they withdrew that?

A. No, we did not offer. We said we would consider looking at a location for this road. We said we would entertain an offer, I believe is what we said.

Q. So you just told them that you'd think about it, but you never committed to it?

A. That's correct.

Q. And then I think your dad proposed an alternate route along the river?

A. Yes.

Q. And he had a list of some nine contingencies he wanted the board to consider.

A. Yes.

Q. Are you aware that the alternate route along the river would cost a significant amount of money, more than what it would cost to put in a road on the existing road?

A. I saw a lot of estimates. I attended several of the board of viewers meetings. I saw a lot of estimates that had quite a range of prices as to what they would cost.

Q. Do you think that's a fair consideration for the board to consider, the cost of the road?

A. Yes.

MR. BAIN: That's all the questions I have.

REDIRECT EXAMINATION

BY MR. HOPKINS:

Q. Mr. Lacy, looking at those pictures, in your opinion if the driveway was properly maintained would vehicles be able to easily pass?

A. Yes. No problem.

Q. And does the driveway look like that every time it rains?

A. No.

MR. HOPKINS: Thank you.

THE WITNESS STANDS ASIDE.

****

JAMES LACY

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION BY MR. HOWELL:

Q. Mr. Lacy, state your name for the Court.

A. James Lacy.

Q. Do you own some of the land that's being condemned?

A. Yes, I do.

Q. You own that with your father and Epps?

A. Correct.

Q. Are you familiar with the driveway to the King family property?

A. Yes, I am.

Q. What type of easement do they have over the property?

A. They have an easement to come and go. We have never stopped them from using the easement. I don't know what the legal term is, but you know, they have an easement to come and go.

Q. Have you ever stopped them from grading that property and putting down gravel or trimming the trees to make it more passable?

A. No. We encourage them, with my brother. Several times we've had people out there, Roger Slagle, Mike Day.

Q. Who are they?

A. They are people that are in the construction business. They do roads and that sort of stuff. And we asked if they would like to participate in fixing the road up to a better state. They always said no, that they didn't have the money. They wanted a state road.

MR. HOWELL: Okay. Thank you.

CROSS EXAMINATION

BY MR. BAIN:

Q. Mr. Lacy, when was the last time that you helped improve the road?

A. The best I can remember is when they fixed 614. They moved a lot of fill dirt and in exchange for allowing us to put this fill dirt on a portion of our land, we agreed that they would take stuff they chunked up when they did the main road, and put it on that road, so we did probably from 614 down to the Roberts. It was in excellent shape.

Q. How long ago was that?

A. When did they redo 614? I have no idea. Maybe '90, '93.

Q. About twelve years ago, is that right?

A. Maybe twelve years ago.

THE WITNESS STANDS ASIDE.

MR. HOWELL: That's all, Your Honor.

THE COURT: Mr. Slayton?

MR. SLAYTON: At this time the county would like to argue a motion to strike. Your Honor, we've come full circle. We're back where we started. As you noted in our opening, the only issue here today is the public purpose. There's been absolutely no evidence of fraud. Fraud is not an issue here. There have been allegations that the actions of the Board of Supervisors were arbitrary and capricious.

As I said in opening, one of the words attributed to the phrase arbitrary and capricious by definition is whimsical, which suggests a lack of faith, a lack of thought, a lack of reasoning. All the evidence that the Court has heard at this point is on behalf of the landowners. The standard which applies is as follows. First, the county begins with a presumption of reasonableness of its actions, comes to court with the benefit of that. If this Court determines that any evidence has been brought forward which raises question, puts into play arbitrary and capricious, then the burden shifts back to the county, but the burden that shifts back to the county is one of the lowest burdens in the law. The Court must look not at what a legislative body was told and further, Your Honor, the Virginia Supreme Court has said that a fairly faithful standard is less than even a preponderance of the evidence. So if under this statute there is any way that reasonable people could reach different conclusions based on the same information, the county has met its burden. All of the evidence produced to this point, and our own evidence shows that reasonable people, I think the Court will find, listening to the same information for a long period of time have reached different conclusions. We therefore submit that to the extent the landowners have carried forth the burden of bringing the issue of arbitrary and capricious on behalf of the board, the board has more than countered by meeting the burden it should have met. The Virginia Supreme Court has held that public purpose is not tantamount or the same as public use. The fact that the benefit enures to a particular person or class of persons is irrelevant. The dominant use of this facility would be in the public

sector. The Virginia Supreme Court held that if the road is open to the public, available for use by the public, it satisfies the public purpose status. There is a case, Your Honor, the Stuart case in Virginia, which I think dramatically carries the case for the county. In the Stuart case a condemnation proceeding is part of a major road improvement. As part of that improvement, an existing access was terminated. As a part of this condemnation proceeding the condemnor sought to acquire the landowner's property to construct a service road, and the Supreme Court even went so far as to include in its opinion a drawing showing the facts presented in this case, and I have that case here, and would welcome the opportunity to show it to you. Your Honor. But what the arguments the landowners made was because the limited access road would benefit only one property owner, which is abundantly clear from the record, because that one property owner fronted on two other state maintained public roads, that there wasn't a necessity, there wasn't a need for this improvement. The Virginia Supreme Court rejected that argument and said even in a case where the benefit is realized by one landowner, even when there is access elsewhere, that the action of the board "is appropriate and the reason is that that service road, once opened, taken into the state system, therefore it would be available to the public at large. Now, the Kelo case, the one that has drawn so much attention, a recent 0. S. Supreme Court case, there was a taking there. The property was taken. Your Honor, to benefit the residents of the village. The King Village is not a private enterprise. It is not an area that was developed by one subdivider. This is not a

profit enterprise. This is citizens of the community that own land in the family for generations who have lawfully established, built houses and made use of this road. In addition to that, it is used by two other property owners, whose houses adjoin that road. Those two property owners will benefit as well. In addition to that, it's an important public purpose to be served by having access to these homes, to these people under emergency conditions which now does not exist. The evidence on that point is not even in conflict. Dan Lacy said that he has seen emergency service vehicles go down the road. No one has said that's not true. That has not been offered into evidence. What the King Village residents have said that in certain weather conditions it's not passable and they cited specific instances when that was true. That is uncontradicted evidence. This is an issue, Your Honor, the Board of Supervisors of this county have wrestled with and dealt with a very long time. We believe under Virginia law there is no question that this road would be placed in public use, which is public purpose, would be available to the general public and far exceeds the standard established in the Stuart case, and Your Honor, if I may, I would like to show you that case. May I approach the bench?

THE COURT: Yes, sir.

MR. SLAYTON: Your Honor, I will cite from two other cases if I may. In the Foster case, 215 VA 543 the Virginia Supreme Court stated that the test is not whether it is to benefit public use. Quoting from the 0. S. Supreme Court case, Kelo versus the City of New London, "This court has long ago

rejected any literal requirement that condemns property be put into use for the public. It has embraced a broader, more natural interpretation of public use as public purpose." That, Your Honor, we submit is what we have here. I think the evidence will support our motion to strike. We submit this matter to the Court on that basis.

THE COURT: Thank you, sir.

MR. HOPKINS: Your Honor, I'd first like to start out by saying we're not relegated to an arbitrary and capricious standard, but before I get there I just want to make sure you still have the easement case I gave you this morning. Your Honor, I'm looking at page five of that case, and the cite on that case is Onie versus West Buena Vista. And in the first full paragraph on that page - I'm looking at page five of that case. In there the court makes clear, it says "The rule is that the grantor or dedicator of an easement is generally under no obligation to make repairs and that this duty rests upon those who use the easement, and if they fail to keep it in proper condition for the uses for which it was granted or dedicated, they must suffer the result and inconvenience." Your Honor, I think that case is very important, especially in light of Kelo. I'm glad earlier counsel mentioned Kelo, because when the Court goes into their analysis on Kelo, Your Honor, they start out with their legal analysis, they say without equivocation that condemnors are forbidden from taking an owner's land for the purpose of conferring the private benefit on a particular private party. Then they go on to say that a condemnor cannot take property to benefit a particular class of

identifiable individuals and the Supreme Court of the United States was very clear in Kelo. They made a point to go out of their way to say that the beneficiaries in that case were not known at the time the plan was adopted. The Pfizer Corporation was also a beneficiary in that case, Your Honor, and the Court stressed the point that at the time the City of New London adopted their plan and decided to take property, they didn't do it with Pfizer in mind. Pfizer wasn't even in the picture. That's much different from what we have here. We have in this case a particular class of identifiable individuals, and there's no doubt from the evidence that the taking was to benefit those individuals. And further proof of that, Your Honor, is the county's own petition, the board's petition. In their petition in paragraph six they say the purpose is to serve the said King Village property. The taking is to serve or benefit a particular class of identifiable individuals, and that class of individuals in this case, Your Honor, not only were they known, not only was the taking for their benefit, they went and asked the board to take the property for them only after they couldn't purchase it from the owners, and not only did they do that, they're also paid for the property. It's almost as if they're using the government in its extraordinary power of eminent domain as a straw man. And Your Honor, that's just the analysis under the fifth amendment, and I think the Supreme Court was very clear that a condemnor cannot take to benefit a particular class of identifiable individuals. Once we move past that, Your Honor, we get to Virginia law. The Phillips case made clear — and I'm going to quote the Virginia Supreme Court in that case - they said in striking for lack of public use

the court said - and I quote - "The purpose of this case is for the improvement of one's land at his neighbor's expense." That's exactly what we have in this case, Your Honor.

THE COURT: The facts are different in the two cases, are they not?

MR. HOPKINS: Well, Your Honor, what I'd like to point out, I think the facts are always different in different cases but the principles are the same. In Phillips it was a valid public purpose. There was a statute that allowed takings for drainage, just like there are statutes about takings for roads, but the court in that case said that it was not a public use because the public use did not predominate. And that's what makes these cases similar. The North Carolina case was very instructive. The North Carolina Supreme Court said in that case, Your Honor, they had facts identical to this case and the court applied the same principles as the United States Supreme Court espoused in Kelo, and they struck down the taking, I think it's very important to note in the Phillips case drainage was a valid public purpose, but the court said under the facts of that case it wasn't a public use because the public use didn't predominate. I think we've seen evidence here today the only people that will use this road, if you want to call it a road, will be the King Village residents, their visitors and anybody serving the King Village.

THE COURT: And the two Roberts.

MR. HOPKINS: The Roberts would use part of the road, yes, sir. In the Bass case I think there were three families. That's exactly what we have here. The facts are identical to what we have here. Then, Your Honor, I think moving past the point where this is to benefit the Kings - before I move on I'd also like to point out the viewers' own notes, and that went in evidence today, the viewers even said this taking was to serve the King residents. They didn't even say King property. They said the King residents. If that is not a particular class of identifiable individuals, I don't know what would constitute them. And that was the board of viewers' own notes. That's what the board relied on. And moving past that, Your Honor, if we get into arbitrary and capricious review, in paragraph six of their petition they said it's to serve the King Village and they said there would be two purposes in serving the King Village; one is so the emergency vehicles would go down the road, and the second is so they can provide safe school bus service. Your Honor, the evidence is very clear. They haven't even consulted any of the emergency vehicle departments. There's nothing of record to know whether emergency vehicles can get down there or not. They relied simply on the King residents, the very class of individuals asking for the property. They never consulted the fire department, never consulted the police department, never consulted EMS. And Your Honor, the board of viewers' own report said that those emergency vehicles do use the property. They do go down the road.

THE COURT: Mr. Hopkins, would it make a difference to you if all of the people that now live in

King Village were not related in any way and just happened to own a piece of property? There are thirteen homes down there. Would it make any difference to you if all thirteen people were not related whatsoever, just living down there? Would the county still not be able to condemn the property?

MR. HOPKINS: Not under the facts of this case, Tour Honor, because they would still be a particular class of individuals.

THE COURT: Whenever can the county then condemn property for a road to service private individuals who have built homes in that county, under your way of thinking?

MR. HOPKINS: When people dedicate the property. That's what developers do all the time, Your Honor.

THE COURT: Would it make a difference?

MR. HOPKINS: If there is a party that goes to the board and asks for property to be condemned for their benefit, and it's an identifiable party at the time the project is adopted, if the identify of the beneficiary is known, I don't think they can. That's why developers - a developer can't go buy a piece of property that has insufficient access and then ask the county to take a driveway or a road for him. He has to dedicate it. And the power of eminent domain is an extreme power.

THE COURT: I'm not talking about a developer, I'm talking about people that live on dirt

roads, any of these other roads that you're talking about or we've heard about in Halifax County. What you're telling me is that a group of individuals cannot go to the county and say, "Look, we would like to have a road. Please do something, condemn the property if necessary"?

MR. HOPKINS: I would say the Supreme Court has told us is that if the purpose of the taking was to benefit a particular class of identifiable individuals, they couldn't. Pfizer couldn't go to the City of New London under the Supreme Court's analysis and say take property for us, whether it be a road or whatever it might be. If it's a particular class of identifiable individuals, going to the government and asking them to take some other citizen's property and the taking is for that class of individuals, for their benefit, I don't think it's proper. And I think Phillips makes that clear, Your Honor. In Phillips they said you can't take - the purpose in the Phillips case was for the improvement of one's land at his neighbor's expense. That's exactly what we have going on here. And Your Honor, I think the fact that they didn't consult any of the emergency departments, and then the fact that the school system said there has never been a safety problem there. That bus stop has been there for years. Not only is that an arbitrary decision, but it shows the pretext, that they are claiming they need to take this property for emergency vehicles to go down the road and so they will have a safe school bus stop there. That shows that that's nothing more than a pretext. They didn't check with emergency departments and the school system says that the bus stop is fine, and Your Honor, under 15.2-1900 of the Virginia Code,

the General Assembly has defined public use and they defined it as all uses necessary for public purposes. So this taking has to be necessary. The taking also fails in that aspect. I go back to the easement case. If the Kings maintain their easement, there is no necessity to take the Lacy property. They can't simply refuse to maintain their road, the duty which the law clearly places on them, and then have the Board of Supervisors condemn their neighbor's property for their benefit. That's improper and under the very definition of public use under 15.2-1900 it doesn't qualify as public use. It's not necessary to take the Lacys' property. If the public purpose is to provide access to the King family, and that's exactly what the board says, then we still have to see is it necessary to take the Lacys' property to achieve that public purpose. That's exactly what the definition says under 15.2-1900. It's not necessary because the Kings have a right to maintain their road. Instead of maintaining their road, they went to the Board of Supervisors and said, "It's too difficult for us to maintain our road, please take it for us." Now they have the State of Virginia paying $190,000 to build them a road simply because they wouldn't maintain it, and the law clearly places that duty on them. The Onie case makes that crystal clear. And so I would say under the very definition of public use, Your Honor, this is not necessary, it's not necessary to take the Lacys' property to provide access. And so I would just submit that to the Court, Sour Honor. With regard to the Stuart case, I'm familiar with that case. The only issue in Stuart was is it a public road or is it a private road, but just because something is a public road doesn' t make it per se constitutional. You still

go under the constitutional analysis. In Phillips you can take property, but the court still looks at it. If you look at it on a case by case basis - and in Stuart what happened was VDOT was building a public road and they took one other access road, and all they did was take property to give him his access back. Those facts are quite different. There was no evidence that the taking was to benefit a particular class of individuals, identifiable individuals. It' s a very different case. I would suggest to the Court that the case most on point is the Bass case. Under the Bass case they struck down the taking because they said - I quote - "It would be of substantial and dominant use and benefit of Mr. and Mrs. Bass and a few of their relatives, and any use by or any benefit for the general public will be only incidental and purely conjectural." That's what we have today, Your Honor. This is a dead-end road, nine-tenths of a mile, goes right to the King family's property, the very family who is asking for the road, and that's an improper use. It doesn't even constitute a public use under the very definition given by the General Assembly. Your Honor, I thank you for taking the time to hear us today.

THE COURT: Thank you, sir.

MR. SLAYTON: It seems that property owners in need of a public road would be in a quandary. According to what I've heard they must maintain their road so it remains passable at all times, but if they do that then they've proved the case against themselves. It puts the property owners in an impossible situation. The Virginia Supreme Court has ruled, Your Honor, that in these

type of cases it is perfectly appropriate for supervisors to use their common sense to make a determination. They said over and over and over the supervisors didn't go out and interview emergency service workers to see if they were able to get access. That's not a duty they have. There was uncontrovertible evidence today at critical times emergency service vehicles have not been able to reach this property. There is a legitimate public use. As far as an identifiable class of person goes, King Village is the name of a piece of real estate. There is no subdivision name. It was called King Village because these people are descendants of Thaddeus King who originally lived there, but there is no road contemplated in this county that does not lead to a group of people who can be identified. That is simply not the test. As you've said, if I understand your argument, Your Honor, if these people happened not to be related to each other, and went to great lengths about the extent which some of them are not related trying to discredit their deeds', that somehow that would change the outcome of this case. We suggest that's illogical, we suggest that that is not appropriate and not consistent with Virginia law. I think the supervisors have given this very difficult issue credible attention and consideration. VDOT has decided that it meets their test to come into the public system, the money is available to do it, the need is very real, and therefore, Your Honor, we respectfully submit our motion to strike should be sustained.

THE COURT: Mr. Slayton, what about the point that the people obviously were solicitous to pay $12,600 to the county to fund, I assume, nobody has

said that, but the inference can be drawn that that money was to fund the purchase of the right of way. How can the county do that?

MR. SLAYTON: Your Honor, I think the county can accept contributions for any purpose.

THE COURT: That doesn't offend you in any way?

MR. SLAYTON: It does not, Your Honor. It does not. There's a Virginia case where a developer paid the cost of condemnation in another locality and the Court had no problem with that. So no, sir. If that troubles the Court, then I would respectfully submit that that money is in escrow and can be refunded. The evidence here today was that the landowners had voluntarily placed money in escrow and there's no evidence it has come to the county. That can be undone.

THE COURT: That bothers me. I don't think it has anything to do with the outcome of the case, but that bothers me that the county would solicit money to be paid to do something that they ought to do in their own right. But anyway - anything else you want to say?

MR. SLAYTON: No, sir.

THE COURT: Gentlemen, I can do one of two things. I can go ahead and rule right now, or if you want to — I've got your memos. The only thing I have are the last memos. I have not read the cases.

I'm ready to rule, or if you'd rather, I'll let you submit an updated memo. I'll be glad to do that.

MR. HOPKINS: Your Honor, if I may, this is an extremely important issue. I think it has far-reaching implications. If we could, I would suggest submitting briefs to the Court.

THE COURT: That's what I suggested. If you want to do that, that's what I'd do.

MR. HOPKINS: We would like that, Your Honor. One thing I want to stress before we leave here today is the very power the King family is asking the board to exert on the Lacys today ....

THE COURT: That's argument.

MR. HOPKINS: I'm sorry.

THE COURT: Good try but they are over.

MR. HOPKINS: I'm sorry, Your Honor. We'll submit a brief.

THE COURT: Let's do it this way. Start with you. Submit a brief with proposed findings of fact. Okay?

MR. HOPKINS: Yes, Your Honor.

THE COURT: And then do you all want to alternate or just both of you submit briefs at the same time? I'll do it either way.

MR. SLAYTON: Our position, for the record, is that we are ready to proceed with the decision. We'll submit them simultaneously.

THE COURT: Just submit them simultaneously, and each of you submit a proposed statement of fact. Okay? Or findings of fact. How long do you need?

MR. HOWELL: Two weeks, Your Honor, to allow us to give it the attention we want.

THE COURT: Two weeks from today the memos and statement of fact.

(COURT WAS ADJOURNED)

CERTIFICATE

I, Earline F. Gosney, a Certified Court Reporter*, and a Notary Public for the State of Virginia at large, hereby certify that the foregoing evidentiary hearing in the case of Board of Supervisors of Halifax County versus D. Epps Lacy and James P. Lacy, heard on September 14, 2005, in the Circuit Court of Halifax County, at Halifax, Virginia, was taken down, as stated in the caption, and the proceedings thereto were stenographically recorded by and transcribed by me; that the foregoing 193 pages represent a true and correct transcript of the evidence given by said witness upon said hearing; and I further certify that I am not of kin or counsel to the parties in the case; I am not in the regular employment of counsel for any of said

parties; nor am I in any way interested in the results of said case.

Given under my hand this 9th day of May, 2006.

My commission expires February 28, 2010.

/s/ Earline F. Gosney
NOTARY PUBLIC

*Certification No. 0313025

VIRGINIA: IN THE CIRCUIT COURT OF HALIFAX COUNTY

BOARD OF SUPERVISORS OF HALIFAX COUNTY, VIRGINIA,

Petitioner,

v. At Law No.:CL05-125

D. EPPS LACY, JAMES LACY,

and (as to both Respondents)

2.50 acres in fee simple, situated in Halifax County, Virginia, and more fully described in this Petition for Condemnation,

and (as to both Respondents)

.29 acres in fee simple, situated in Halifax County, Virginia, and more fully described in this Petition for Condemnation,

and (as to D. Epps Lacy only)

.39 acres in fee simple, situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation,

Respondents.

ANSWER AND GROUNDS OF DEFENSE TO PETITION FOR CONDEMNATION

NOW COME the Respondents, D. Epps Lacy and James Lacy, by counsel, and as and for their Answer to the Petition for Condemnation filed herein do hereby state as follows:

1. As to paragraph One of the Petition, the Respondents admit only that the Petitioner is authorized to take property by the power of eminent domain for a constitutionally permissible public use. The Respondents deny any allegations that purport that the taking in this case is for a constitutionally permissible public use.

2. As to paragraph Two of the Petition, the Respondents admit only that they are the owners of the property the Petitioner seeks to take and that a plat was attached to the Petition as Exhibit A, but the Respondents are without sufficient information to admit or deny the accuracy of the contents and information contained in the plat and call for strict proof thereof. The Respondents are without sufficient information to admit or deny the remaining allegations contained in paragraph Two and call for strict proof thereof.

3. The Respondents admit the allegations contained in paragraph Three.

4. The Respondents deny the allegations contained in paragraph Four.

5. As to paragraph Five of the Petition, the Respondents admit only that a document was attached to the Petition as Exhibit B, but the Respondents are without sufficient information to admit or deny the authenticity of or the accuracy of the contents and information contained in Exhibit B and call for strict proof thereof. The Respondents deny all remaining allegations contained in paragraph Five, including any allegations that purport that this taking is for a constitutionally permissible public use. The proposed taking is for the private purpose and benefit of the residents of King Village, an illegal subdivision in violation of the Petitioner's own zoning ordinances.

6. The Respondents deny the allegations contained in paragraph Six, including any allegations that purport that this taking is for a constitutionally permissible public use. The proposed taking is for the private purpose and benefit of the residents of King Village, an illegal subdivision in violation of the Petitioner's own zoning ordinances.

7. The Respondents deny the allegations contained in paragraph Seven. The Petitioner's taking in this case lacks a constitutionally permissible public use, and its offer was made to the Respondents under the threat of condemnation for a private purpose.

AFFIRMATIVE DEFENSES

1. The Petitioner's actions are invalid because the Petitioner seeks to take the Respondents' property for a private purpose and not for a

constitutionally permissible public use. The Petitioner's taking is for the benefit of a private, illegal subdivision.

2. The Petitioner's taking in this case is arbitrary, capricious, fraudulent, and in bad faith.

3. The animating purpose of the proposed taking is to facilitate and foster the growth and private needs of an illegal subdivision. The growth of the illegal subdivision created the purported need for the road the Petitioner seeks to construct on the Respondents' property, and the road will foster increased development of a subdivision that was illegally created. Halifax County's selective enforcement, or its lack of enforcement, of its zoning laws have created any purported need for the construction of the road. Instead of enforcing its zoning laws to prohibit the development of the illegal subdivision, Halifax County seeks to use the extraordinary power of eminent domain to condemn the Respondents' property in order to provide for the alleged needs of the private, illegal subdivision.

4. The Petitioner fails to enumerate the limitations on its use of the power of eminent domain. The Petitioner may exercise the power of eminent domain only according to the limitations and restrictions imposed by law and Article I, Section 11 of the Constitution of Virginia. The Petitioner may take property by the extraordinary power of eminent domain only for a constitutionally permissible public use.

5. In the event that this Petition is not dismissed, the Respondent elects to have commissioners impaneled to determine just compensation in this matter.

WHEREFORE, the Respondents and property owners, D. Epps Lacy and James Lacy, respectfully pray that the Petition for Condemnation be dismissed, with prejudice, that all relief prayed for by the Petitioner be denied, and that the Respondents recover their costs and attorney's fees expended in their behalf, as well as such other relief as may be required to attain the ends of justice.

D. EPPS LACY AND JAMES LACY

By: /s/ Jeremy P. Hopkins
Counsel

Jeremy P. Hopkins
VSB#: 48394
Waldo & Lyle, P.C.
301 W. Freemason Street
Norfolk, Virginia 23510
Telephone: (757) 622-5812
Facsimile: (757) 622-5815

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Answer and Grounds of Defense to Petition for Condemnation was mailed on this 25th day of April 2005 to:

Russell O. Slayton, Jr.
Slayton, Bain, and Clary
411 South Hicks Street
P.O. Box 580
Lawrenceville, Virginia 23868

/s/ Jeremy P. Hopkins
Jeremy P. Hopkins

VIRGINIA: IN THE CIRCUIT COURT OF HALIFAX COUNTY
CASE NUMBER: _____

BOARD OF SUPERVISORS OF
HALIFAX COUNTY, VIRGINIA Petitioner

v.

D. EPPS LACY
1029 Love Shop Road
Halifax, Virginia 24558

AND

JAMES LACY
1065 Love Shop Road
Halifax, Virginia 24558 Respondents

AND (as to both Respondents)

2.50 acres in fee simple, plus five drainage easements located on property adjoining said 2.50 acres, all situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation

AND (as to both Respondents)

0.29 of an acre in fee simple, plus one drainage easement located on property adjoining said 0.29 of an acre, all situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation.

AND (as to Respondent D. Epps Lacy only)

0.39 of an acre in fee simple, situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation.

PETITION FOR CONDEMNATION

COMES NOW your Petitioner, Board of Supervisors of Halifax County, Virginia ("Board"), and by its counsel respectfully represents as follows:

1. Your Petitioner is the governing body of Halifax County, Virginia ("County"), a political subdivision of the Commonwealth of Virginia, which is empowered to condemn real property and bring suits in its name on behalf of the County.

2. The Respondents, D. Epps Lacy and James Lacy, are the fee simple owners of the real property described above as consisting of 2.50 acres, 0.29 of an acre, and the six drainage easements which adjoin said properties, all shown on a plat (Sheets 1-5, inclusive) made by James T. Bradley, L.S., dated November 26, 2004 ("Plat"), a copy of which plat is attached hereto as "Exhibit A" and incorporated herein by this reference.

3. Respondent D. Epps Lacy is the fee simple owner of the real property described above as consisting of 0.39 of an acre, as shown on the Plat.

4. The authority for the taking is specifically provided by Section 15.2-1901.1 of the Code of Virginia, 1950, as amended, which grants to

the Board the power to acquire by condemnation title to land, buildings and structures, or any easement thereover, for the purpose of opening, constructing, repairing or maintaining a road, or for any authorized public undertaking, if the terms of purchase cannot be agreed upon, and Section 15.2-1902 of the Code of Virginia, 1950, as amended, authorizes the Board to proceed pursuant to the provisions of Chapter 2 (Section 25.1-200, et seq.) of Title 25.1.

5. The necessity for, and the public interest served by, the condemnation is the need to construct a new access road to serve the property located in the County which is known generally as King Village. A copy of a resolution adopted by the Board on March 1, 2004, authorizing the condemnation as a consequence of the need and public interest to be served is attached hereto as "Exhibit B" and incorporated herein by this reference.

6. The public use for which the property is to be taken is the construction of a new access road to serve the said King Village property, which access road will provide a safe and adequate means of traveling between State Route 614 and the King Village property, and which will enable access to the King Village property by emergency response vehicles under all weather conditions, and which will enable public school buses to serve the public need for safe, adequate and convenient public school bus service to school-age children and their families.

7. In compliance with Section 25.1-204 of the Code of Virginia, 1950, as amended, the Petitioner has made a bona fide, but ineffectual, effort to acquire the real property and drainage easements described above, which effort was made by providing written purchase offers to the Respondents, which offers were based on appraisals conducted by Fred A. Smith, a duly licensed real estate appraiser.

WHEREFORE, your Petitioner prays for judgment that the real property described above as consisting of 2.50 acres, 0.29 of an acre, the six drainage easements which adjoin said properties, and 0.39 of an acre be condemned, and that title thereto be vested in Petitioner, free of encumbrance or claim; that just compensation for such real property and drainage easements be ascertained and awarded; that damages, if any, as a result of said taking and use by Petitioner, beyond the peculiar benefits, if any, by reason of the taking and use by Petitioner, be ascertained and awarded; and for such other and further relief as may be lawful and proper.

Respectfully submitted this 5th day of April, 2005.

BOARD OF SUPERVISORS OF
HALIFAX COUNTY, VIRGINIA

/s/ Russell O. Slayton, Jr.
Of Counsel

Russell O. Slayton, Jr.
VSB #14202
Slayton, Bain and Clary
411 South Hicks Street
Post Office Box 580
Lawrenceville, Virginia 23868
434-848-3632 (telephone)
434-848-3808 (telefax)

[HALIFAX COUNTY CIRCUIT COURT, VA
ROBERT W. CONNER, CLERK
A copy teste: /s/ J. Anderson [ ] Clerk
[✓] Dep. Clerk]

EXHIBITS AVAILABLE
UPON REQUEST

VIRGINIA: IN THE CIRCUIT COURT OF HALIFAX COUNTY
CASE NUMBER: _____.

BOARD OF SUPERVISORS OF
HALIFAX COUNTY, VIRGINIA Petitioner

v.

D. EPPS LACY
1029 Love Shop Road
Halifax, Virginia 24558

AND

JAMES LACY
1065 Love Shop Road
Halifax, Virginia 24558 Respondents

AND (as to both Respondents)

2.50 acres in fee simple, plus five drainage easements located on property adjoining said 2.50 acres, all situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation

AND (as to both Respondents)

0.29 of an acre in fee simple, plus one drainage easement located on property adjoining said 0.29 of an acre, all situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation.

AND (as to Respondent D. Epps Lacy only)

0.39 of an acre in fee simple, situate in Halifax County, Virginia, and more fully described in this Petition for Condemnation.

AFFIDAVIT

This day personally appeared before me, Heidi R. Farmer, a Notary Public of and for the Commonwealth of Virginia, State-at-Large, in the County of Brunswick, Russell O. Slayton, Jr., attorney for, and as such agent of, the Board of Supervisors of Halifax County, Virginia, in the above-styled cause, who made oath before me that all of the information contained in the Petition filed with this Court by the Board of Supervisors of Halifax County, Virginia, for condemnation of certain property and drainage easements of the Respondents, is true and correct to the best of his knowledge and belief.

/s/ Russell O. Slayton, Jr.
Russell O. Slayton, Jr.,
Attorney for Petitioner

Subscribed and sworn to before me in the State of Virginia, County of Brunswick, this 5th day of April, 2005.

(SEAL) /s/ Heidi R. Farmer
Notary Public

My commission expires: April 30, 2008.

Kelo v. City of New London,
Conn.U.S.Conn.,2005.
Supreme Court of the United States

Susette **KELO**, et al., Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, et al.
No. 04-108.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed a dissenting opinion.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Institute for Justice, William H. Mellor, Scott G. Bullock, Counsel of Record, Dana Berliner, Steven Simpson, Washington, DC, Sawyer Law Firm, LLC, Scott W. Sawyer, New London, CT, Counsel for Petitioners.

Wesley W. Horton, Counsel of Record, Daniel J. Krisch, Horton, Shields & Knox, P.C., Hartford, CT, Thomas J. Londregan, Jeffrey T. Londregan, Conway & Londregan, P.C., New London, CT, Edward B. O'Connell, David P. Condon, Waller, Smith & Palmer, P.C., New London, CT, Counsel for the Respondents. For U.S. Supreme Court briefs,

see:2004 WL 2811059 (Pet.Brief)2005 WL 429976 (Resp. Brief) 2005 WL 353691 (Reply. Brief) Justice STEVENS delivered the opinion of the Court. In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution. FN1

> FN1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to

designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review. FN2 Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

FN2. Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the area, which varied in extensiveness and emphasis. The Office of Planning and Management, one of the primary state agencies undertaking the review, made findings that the project was consistent with relevant state and municipal development policies. See 1 App. 89-95.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a

2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. 1 App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. § 8- 188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. § 8-193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case. FN3

> FN3. In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull 4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). 2 App. to Pet. for Cert. 343-350. FN4

> FN4. While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to

> develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A.2d 500, 509-510, 540 (2004).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. § 8-186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A.2d, at 515-521. Next, relying on cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), and *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A.2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public

use, *id.*, at 82, 843 A.2d, at 552-553, and, second, whether the takings were for "reasonably foreseeable needs," *id.*, at 93, 843 A.2d, at 558-559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.*, at 120-121, 843 A.2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A.2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. 542 U.S. —, 125 S.Ct. 27, 159 L.Ed.2d 857 (2004).

III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1986) FN5 Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. 268 Conn., at 54, 843 A.2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. FN6 Therefore, as was true of the statute challenged in *Midkiff*, 467 U.S., at 245, 104 S.Ct.

2321, the City's development plan was not adopted "to benefit a particular class of identifiable individuals."

FN5. See also *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) ("An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority .... A few instances will suffice to explain what I mean ... [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them" (emphasis deleted)).

FN6. See 268 Conn., at 159, 843 A.2d, at 595 (Zarella, J., concurring in part and dissenting in part) ("The record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront"). And while the City intends to transfer certain of the parcels to a private developer in a long-term lease-which developer, in turn, is expected to lease the

> office space and so forth to other private tenants-the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of *B* when the identity of *B* was unknown.

On the other hand, this is not a case in which the City is planning to open the condemned land-at least not in its entirety-to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." *Id.*, at 244, 104 S.Ct. 2321. Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer *(e.g.,* what proportion of the public need have access to the property? at what price?), FN7 but it proved to be impractical given the diverse and always evolving needs of society. FN8 Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-164, 17 S.Ct. 56, 41 L.Ed. 369 (1896). Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not

own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906).FN9 We have repeatedly and consistently rejected that narrow test ever since. FN10

FN7. See, *e.g.*, *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 410, 1876 WL4573, *11 (1876) ("If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad").

FN8. From upholding the Mill Acts (which authorized manufacturers dependent on power-producing dams to flood upstream lands in exchange for just compensation), to approving takings necessary for the economic development of the West through mining and irrigation, many state courts either circumvented the "use by the public" test when necessary or abandoned it completely. See Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U.L.Rev. 615, 619-624 (1940) (tracing this development and

collecting cases). For example, in rejecting the "use by the public" test as overly restrictive, the Nevada Supreme Court stressed that "[m]ining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valleys could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. ... The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals." *Dayton Gold & Silver Mining Co.*, 11 Nev., at 409-410, 1876 WL, at *11.

FN9. See also *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (upholding a statute that authorized the owner of arid land to widen a ditch on his neighbor's property so as to permit a nearby stream to irrigate his land).

FN10. See, *e.g.*, *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916) (

> "The inadequacy of use by the general public as a universal test is established"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-1015, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public").

The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. *Id.*, at 31, 75 S.Ct. 98. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation,

deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. *Id.*, at 34, 75 S.Ct. 98. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building." *Id.*, at 35, 75 S.Ct. 98. The public use underlying the taking was unequivocally affirmed:

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive .... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.*, at 33, 75 S.Ct. 98.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the

state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit." *Id.*, at 235, 104 S.Ct. 2321 (internal quotation marks omitted). Reaffirming *Berman's* deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. 467 U.S., at 241-242, 104 S.Ct. 2321. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "[I]t is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use. *Id.*, at 244, 104 S.Ct. 2321.

In that same Term we decided another public use case that arose in a purely economic context. In *Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), the Court dealt with provisions of the Federal Insecticide, Fungicide, and Rodenticide Act under which the Environmental Protection Agency could consider the data (including trade secrets) submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data. We acknowledged that the "most direct beneficiaries" of these provisions were the subsequent applicants, *id.*, at 1014, 104 S.Ct. 2862, but we nevertheless upheld the statute under *Berman* and *Midkiff*. We found sufficient Congress' belief that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby

enhanced competition. 467 U.S., at 1015, 104 S.Ct. 2862.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-607, 28 S.Ct. 331, 52 L.Ed. 637 (1908) (noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people").FN11 For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

> FN11. See also *Clark*, 198 U.S., at 367-368, 25 S.Ct. 676; *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906) ("In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United

States does not require us to say that they are wrong"); *O'Neill v. Leamer*, 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915) ("States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect").

IV

Those who govern the City were not confronted with the need to remove blight in ***2665** the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including-but by no means limited to-new jobs and increased tax revenue. As with other exercises in urban planning and development, FN12 the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.

Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

> FN12. Cf. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[5]To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, see, *e.g.*, *Strickley*, 200 U.S. 527, 26 S.Ct. 301; in *Berman,* we endorsed the purpose of transforming a blighted area into a "well-balanced" community through redevelopment, 348 U.S., at 33, 75 S.Ct. 98; FN13 in *Midkiff,* we upheld the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the

State's residential land market," 467 U.S., at 242, 104 S.Ct. 2321; and in *Monsanto,* we accepted Congress' purpose of eliminating a "significant barrier to entry in the pesticide market," 467 U.S., at 1014-1015, 104 S.Ct. 2862. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic ***2666** development from our traditionally broad understanding of public purpose.

> FN13. It is a misreading of *Berman* to suggest that the only public use upheld in that case was the initial removal of blight. See Reply Brief for Petitioners 8. The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future. See 348 U.S., at 34-35, 75 S.Ct. 98 ("It was not enough, [the experts] believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums.... The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented"). Had the public use in *Berman* been defined more narrowly, it would have

been difficult to justify the taking of the plaintiff's nonblighted department store.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff,* the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. In *Monsanto,* we recognized that the "most direct beneficiaries" of the data-sharing provisions were the subsequent pesticide applicants, but benefiting them in this way was necessary to promoting competition in the pesticide market. 467 U.S., at 1014, 104 S.Ct. 2862 FN14 The owner of the department store in *Berman* objected to "taking from one businessman for the benefit of another businessman," 348 U.S., at 33, 75 S.Ct. 98, referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. FN15 Our rejection of that contention has particular relevance to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.,* at 34, 75 S.Ct. 98. FN16

FN14. Any number of cases illustrate that the achievement of a public good often coincides

with the immediate benefiting of private parties. See, *e.g.*, *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 422, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (public purpose of "facilitating Amtrak's rail service" served by taking rail track from one private company and transferring it to another private company); *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (provision of legal services to the poor is a valid public purpose). It is worth noting that in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), *Monsanto,* and *Boston & Maine Corp.*, the property in question retained the same use even after the change of ownership.

FN15. Notably, as in the instant case, the private developers in *Berman* were required by contract to use the property to carry out the redevelopment plan. See 348 U.S., at 30, 75 S.Ct. 98.

FN16. Nor do our cases support Justice O'CONNOR's novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some "harmful property use." *Post,* at 2675 (dissenting opinion). There was nothing "harmful" about the non-blighted department store at issue in *Berman*, 348 U.S. 26, 75 S.Ct. 98; see also n. 13, *supra;* nothing "harmful" about the lands at issue in the mining and agriculture cases, see, *e.g.*,

Strickley, 200 U.S. 527, 26 S.Ct. 301; see also nn. 9, 11, *supra;* and certainly nothing "harmful" about the trade secrets owned by the pesticide manufacturers in *Monsanto*, 467 U.S. 986, 104 S.Ct. 2862. In each case, the public purpose we upheld depended on a private party's *future* use of the concededly nonharmful property that was taken. By focusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause. See U.S. Const., Amdt. 5. ("[N]or shall private property be taken for public use, without just compensation"). Justice O'CONNOR's intimation that a "public purpose" may not be achieved by the action of private parties, see *post,* at 2675, confuses the *purpose* of a taking with its *mechanics,* a mistake we warned of in *Midkiff*, 467 U.S., at 244, 104 S.Ct. 2321. See also *Berman*, 348 U.S., at 33-34, 75 S.Ct. 98 ("The public end may be as well or better served through an agency of private enterprise than through a department of government").

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive ***2667** use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, FN17 the

hypothetical cases posited by petitioners can be confronted if and when they arise. FN18 They do not warrant the crafting of an artificial restriction on the concept of public use. FN19

FN17. Courts have viewed such aberrations with a skeptical eye. See, *e.g.*, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D.Cal.2001); cf. *Cincinnati v. Vester*, 281 U.S. 439, 448, 50 S.Ct. 360, 74 L.Ed. 950 (1930) (taking invalid under state eminent domain statute for lack of a reasoned explanation). These types of takings may also implicate other constitutional guarantees. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) *(per curiam)*.

FN18. Cf. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 72 L.Ed. 857 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits").

FN19. A parade of horribles is especially unpersuasive in this context, since the Takings Clause largely "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). Speaking of the takings power, Justice Iredell observed that "[i]t is not sufficient to urge, that the power may be

> abused, for, such is the nature of all power-such is the tendency of every human institution: and, it might as fairly be said, that the power of taxation, which is only circumscribed by the discretion of the Body, in which it is vested, ought not to be granted, because the Legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutory confidence." *Calder*, 3 Dall., at 400, 1 L.Ed. 648 (opinion concurring in result).

[6]Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts." *Midkiff*, 467 U.S., at 242, 104 S.Ct. 2321 FN20 Indeed, earlier this Term we explained why similar practical concerns (among others) undermined the use of the "substantially advances" formula in our regulatory takings doctrine. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, —, 125 S.Ct. 2074, 2085, 161 L.Ed.2d 876 (2005) (noting that this formula "would empower and might often require courts to substitute their predictive judgments for those of elected legislatures and expert agencies"). ***2668** The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a

comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

> FN20. See also *Boston & Maine Corp.*, 503 U.S., at 422-423, 112 S.Ct. 1394 ("[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives"); *Monsanto*, 467 U.S., at 1015, n. 18, 104 S.Ct. 2862 ("Monsanto argues that EPA and, by implication, Congress, misapprehended the true 'barriers to entry' in the pesticide industry and that the challenged provisions of the law create, rather than reduce, barriers to entry .... Such economic arguments are better directed to Congress. The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective").

[7] Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary

line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman*, 348 U.S., at 35-36, 75 S.Ct. 98.

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. [FN21] We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, [FN22] while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. [FN23] As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. [FN24] This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

FN21. The *amici* raise questions about the fairness of the measure of just compensation. See, *e.g.*, Brief for American Planning Association et al. as *Amici Curiae* 26-30. While important, these questions are not before us in this litigation.

FN22. See, *e.g.*, *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

FN23. Under California law, for instance, a city may only take land for economic development purposes in blighted areas. Cal. Health & Safety Code Ann. §§ 33030-33037 (West 1997). See, *e.g.*, *Redevelopment Agency of Chula Vista v. Rados Bros.*, 95 Cal.App.4th 309, 115 Cal.Rptr.2d 234 (2002).

FN24. For example, some argue that the need for eminent domain has been greatly exaggerated because private developers can use numerous techniques, including secret negotiations or precommitment strategies, to overcome holdout problems and assemble lands for genuinely profitable projects. See Brief for Jane Jacobs as *Amicus Curiae* 13-15; see also Brief for John Norquist as *Amicus Curiae*. Others argue to the contrary, urging that the need for eminent domain is especially great with regard to older, small cities like New London, where centuries of development have created an extreme over-division of land and thus a real market impediment to land assembly. See Brief for Connecticut Conference for Municipalities et al. as *Amici*

Curiae 13, 21; see also Brief for National League of Cities et al. as *Amici Curiae*.

***2669** The judgment of the Supreme Court of Connecticut is affirmed.

It is so ordered.

Justice KENNEDY, concurring.

I join the opinion for the Court and add these further observations.

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5., as long as it is "rationally related to a conceivable public purpose." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); see also *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses, see, *e.g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that,

by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447, 450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Department of Agriculture v. Moreno*, 413 U.S. 528, 533-536, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). As the trial court in this case was correct to observe, "Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose-economic advantage to a city sorely in need of it-is only incidental to the benefits that will be confined on private parties of a development plan." 2 App. to Pet. for Cert. 263. See also *ante,* at 2661.

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to ... the developer [*i.e.,* Corcoran Jennison], and private businesses which may eventually locate in the plan area [*e.g.,* Pfizer], and in that regard, only of incidental benefit to the city." 2 App. to Pet. for Cert.

261. The trial court considered testimony from government officials and corporate officers; *id.,* at 266-271; documentary evidence of communications between these parties, *ibid.;* respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern, *id.,* at 272-273, 278-279; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known, *id.,* at 276; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, *id.,* at 273, 278; ***2670** and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented, *id.,* at 278.

The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." *Id.,* at 276. Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that ... [respondents] were motivated by a desire to aid [other] particular private entities." *Id.,* at 278. See also *ante,* at 2661-2662. Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. 268 Conn. 1, 159, 843 A.2d 500, 595 (2004) (Zarella, J., concurring in part and dissenting in part). This case, then, survives the meaningful

rational basis review that in my view is required under the Public Use Clause.

Petitioners and their *amici* argue that any taking justified by the promotion of economic development must be treated by the courts as *per se* invalid, or at least presumptively invalid. Petitioners overstate the need for such a rule, however, by making the incorrect assumption that review under *Berman* and *Midkiff* imposes no meaningful judicial limits on the government's power to condemn any property it likes. A broad *per se* rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. Cf. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549-550, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding level of scrutiny,

however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me no departure from *Berman* and *Midkiff* is appropriate here. This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimus*. The identity of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes. In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private *2671 purpose, no such circumstances are present in this case.

* * *

For the foregoing reasons, I join in the Court's opinion.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

"An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority .... A few instances will suffice to explain what I mean ....[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) (emphasis deleted).

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded-i.*e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public-in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property-and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

I

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach

Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." App. to Pet. for Cert. 5.

Petitioners own properties in two of the plan's seven parcels-Parcel 3 and Parcel 4A. Under the plan, Parcel 3 is slated for the construction of research and office space as a market develops for such space. It will also retain the existing Italian Dramatic Club (a private cultural organization) *2672 though the homes of three plaintiffs in that parcel are to be

demolished. Parcel 4A is slated, mysteriously, for " 'park support.' " *Id.,* at 345-346. At oral argument, counsel for respondents conceded the vagueness of this proposed use, and offered that the parcel might eventually be used for parking. Tr. of Oral Arg. 36.

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power. Petitioners maintain that the Fifth Amendment prohibits the NLDC from condemning their properties for the sake of an economic development plan. Petitioners are not hold-outs; they do not seek increased compensation, and none is opposed to new development in the area. Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment. While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or

needlessly added." *Wright v. United States*, 302 U.S. 583, 588, 58 S.Ct. 395, 82 L.Ed. 439 (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 231-232, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed.1934). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power-particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325, 13 S.Ct. 622, 37 L.Ed. 463 (1893); see also *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the

eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security. Cf. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) ("The concepts of 'fairness and justice' ... underlie the Takings Clause").

***2673** Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. See *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 74 L.Ed. 950 (1930) ("It is well established that ... the question [of] what is a public use is a judicial one").

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership-such as for a road, a hospital, or a military base. See, *e.g.*, *Old Dominion Land Co. v. United States*, 269 U.S. 55, 46 S.Ct. 39, 70 L.Ed. 162 (1925); *Rindge Co. v. County*

of Los Angeles, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923). Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use-such as with a railroad, a public utility, or a stadium. See, *e.g.*, *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992); Mt. *Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916). But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, *e.g.*, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman*, we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. 348 U.S., at 30, 75 S.Ct. 98. It had become burdened with "overcrowding of dwellings," "lack of adequate

streets and alleys," and "lack of light and air." *Id.*, at 34, 75 S.Ct. 98. Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain. *Id.*, at 28, 75 S.Ct. 98. Mr. Berman's department store was not itself blighted. Having approved of Congress' decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot. *Id.*, at 34-35, 75 S.Ct. 98; see also *Midkiff*, 467 U.S., at 244, 104 S.Ct. 2321 ("it is only the taking's purpose, and not its mechanics, that must pass scrutiny").

***2674** In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 232, 104 S.Ct. 2321. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title. *Ibid.*

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill-equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts' " 'deciding on what is and is not a governmental function and ... invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' " *Id.*, at 240-241, 104 S.Ct. 2321 (quoting *United States ex. rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946)); see *Berman, supra*, at 32, 75 S.Ct. 98 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature's ends. *Midkiff, supra*, at 242, 104 S.Ct. 2321; *Berman, supra*, at 103, 75 S.Ct. 98.

Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321; *id.*, at 241, 104 S.Ct. 2321 ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid' " (quoting *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S.

55, 80, 57 S.Ct. 364, 81 L.Ed. 510(1937))); see also *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 489 (1896). To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use ... [though] the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff, supra*, at 240, 104 S.Ct. 2321 (quoting *Berman, supra*, at 32, 75 S.Ct. 98).

The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society-in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. *Berman, supra*, at 28-29, 75 S.Ct. 98; *Midkiff, supra*, at 232, 104 S.Ct. 2321. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national

franchise, is inherently harmful to society and thus within the government's power to condemn.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public-such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U.S., at 32, 75 S.Ct. 98. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*, at 33, 75 S.Ct. 98. Following up, we said *in Midkiff that* "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U.S., at 240, 104 S.Ct. 2321. This language was unnecessary to the

specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and "public use" cannot always be equated.

The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee-without detailing how courts are to conduct that complicated inquiry. *Ante,* at 2661. For his part, Justice KENNEDY suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take-without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. *Ante,* at 2669-2670 (concurring opinion). Whatever the details of Justice KENNEDY's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025-1026, n. 12, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public

gains in taxes and jobs. See App. to Pet. for Cert. 275-277.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective-private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade-not downgrade-property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. See *Lingle*, 544 U.S. 528, 125 S.Ct. 2074. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with

a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. Cf. *Bugryn v. Bristol*, 63 Conn. App. 98, 774 A.2d 1042 (2001) (taking the homes and farm of four owners in their 70's and 80's and giving it to an "industrial park"); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D.Cal.2001) (attempted taking of 99 Cents store to replace with a Costco); *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by *County of Wayne v. Hathcock*, *471* Mich. 445, 684 N.W.2d 765 (2004); Brief for the Becket Fund for Religious Liberty as *Amicus Curiae* 4-11 (describing takings of religious institutions' properties); Institute for Justice, D. Berliner, Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003) (collecting accounts of economic development takings).

The Court also puts special emphasis on facts peculiar to this case: The NLDC's plan is the product of a relatively careful deliberative process; it proposes to use eminent domain for a multipart, integrated plan rather than for isolated property transfer; it promises an array of incidental benefits (even aesthetic ones), not just increased tax revenue; it comes on the heels of a legislative determination that New London is a depressed municipality. See, *e.g., ante,* at 2666 ("[A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case"). Justice KENNEDY, too, takes great comfort

in these facts. *Ante,* at 2670 (concurring opinion). But none has legal significance to blunt the force of today's holding. If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice KENNEDY's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Finally, in a coda, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. *Ante,* at 2668. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

* * *

It was possible after *Berman* and *Midkiffto* imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory. In the prescient words of a dissenter from the infamous decision in *Poletown,* "[n]ow that we have authorized local

legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." 410 Mich., at 644-645, 304 N.W.2d, at 464 (opinion of Fitzgerald, J.). This is why economic development takings "seriously jeopardiz[e] the security of all private property ownership." *Id.*, at 645, 304 N.W.2d, at 465 (Ryan, J., dissenting).

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own.*" For the National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983).

I would hold that the takings in both Parcel 3 and Parcel 4A are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that "the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134-135 (1765) (nereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Amdt. 5. Defying this understanding, the Court replaces the Public Use Clause with a " '[P]ublic [P]urpose' " Clause, *ante,* at 2662-2663 (or perhaps the "Diverse and Always Evolving Needs of Society" Clause, *ante,* at 2662 (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational," *ante,* at 2667 (internal quotation marks omitted). This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'CONNOR powerfully argues in dissent. *Ante,* at 2671, 2674-2677. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its

original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

I

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process, of law; *nor shall private property be taken for public use, without just compensation.*" (Emphasis added.)

It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is "imperative that the Court maintain absolute fidelity to" the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally. *Shepard v. United States*, 544 U.S. 13, —, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides "just compensation" for the taking, the Takings Clause also prohibits the government from taking property except "for public use." Were it otherwise, the Takings Clause would either be meaningless or empty. If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power-for public or private uses-then it would be surplusage. See *ante,* at 2672 (O'CONNOR, J., dissenting); see also *Marbury v. Madison,* 1 Cranch 137, 174, 2 L.Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Myers v. United States,* 272 U.S. 52, 151, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

Alternatively, the Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." *Cole v. La Grange,* 113 U.S. 1, 8, 5 S.Ct. 416, 28 L.Ed. 896 (1885) (interpreting same language in the Missouri Public Use Clause). In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of ***2679** compensation. This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827) (hereinafter Kent); J. Madison, for the National

Property Gazette, (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds.1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner"). FN1 The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain.

> FN1. Some state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1056-1057, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (Blackmun, J., dissenting). The Framers of the Fifth Amendment apparently disagreed, for they expressly prohibited un-compensated takings, and the Fifth Amendment was not incorporated against the States until much later. See *id.*, at 1028, n. 15, 112 S.Ct. 2886.

The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter Johnson).

The term "use," moreover, "is from the Latin *utor,* which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc." J. Lewis, Law of Eminent

Domain § 165, p. 224, n. 4 (1888) (hereinafter Lewis). When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually "employ" the taken property. See *id.*, at 223 (reviewing founding-era dictionaries).

Granted, another sense of the word "use" was broader in meaning, extending to " [c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." 2 Johnson 2194. Nevertheless, read in context, the term "public use" possesses the narrower meaning. Elsewhere, the Constitution twice employs the word "use," both times in its narrower sense. Claeys, Public-Use Limitations and Natural Property Rights, 2004 Mich. St. L.Rev. 877, 897 (hereinafter Public Use Limitations). Article 1, § 10 provides that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States," meaning the Treasury itself will control the taxes, not use it to any beneficial end. And Article I, § 8 grants Congress power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Here again, "use" means "employed to raise and support Armies," not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See *ibid.* ("Congress shall have Power To ... provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, Classical Republicanism and the Fifth Amendment's "Public Use" Requirement, 49 Duke L.J. 339, 368 (2000) (hereinafter Sales) (noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other, the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with compensation), with 3 *id.*, at 216 (noting action to

remedy "*public* ...nuisances, which affect the public and are an annoyance to *all* the king's subjects"); see also 2 Kent 274-276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great... is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. He continued: "If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." *Ibid.* Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." *Ibid.* When the public took property, in other words, it took it as an individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] *property* from A. and giv[ing] it to B." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798); see also *Wilkinson v. Leland*, 2 Pet. 627, 658, 7 L.Ed. 542 (1829); *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 311, 1 L.Ed. 391 (C.C.D.Pa. 1795).

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly

grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See *Kohl v. United States*, 91 U.S. 367, 371-372, 23 L.Ed. 449 (1876) (noting Federal Government's power under the Necessary and Proper Clause to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise of Congress' enumerated powers, *Sabri v. United States*, 541 U.S. 600, 613, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (THOMAS, J., concurring in judgment), and it must not "subvert basic principles of constitutional design, *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (THOMAS, J., dissenting). In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. See *supra,* at 2678. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.

II

Early American eminent domain practice largely bears out this understanding of the Public Use Clause. This practice concerns state limits on eminent domain power, not the Fifth Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the Takings Clause did not even arguably limit state power until after the passage of the Fourteenth Amendment. See Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599, 599-600, and nn. 3-4 (1949); *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250-251, 8 L.Ed. 672 (1833) (holding the Takings Clause inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." See Sales 367-369, and n. 137 (emphasis deleted). Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Lewis §§ 166, 168-171, 175, at 227-228, 234-241, 243. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. See, *e.g.*, *id.*, § 178, at 245-246; *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9,

16-19, and n. 2, 5 S.Ct. 441, 28 L.Ed. 889 (1885). Those early grist mills "were regulated by law and compelled to serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. Lewis § 178, at 246, and n. 3; see also *Head, supra*, at 18-19, 5 S.Ct. 441. They were common carriers-quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally. See Public Use Limitations 903 (common-carrier status traditionally afforded to "private beneficiaries of a state franchise or another form of state monopoly, or to companies that operated in conditions of natural monopoly").

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. See Lewis § 167, at 230. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. See *id.*, § 167, at 230-234. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-carrier duties. See, *e.g.*, M. Horwitz, The Transformation of American Law 1780-1860, pp. 51-52 (1977).

These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the Public Use Clause, see, *e.g.*, *ante*, at 2662, n. 8 (majority opinion); Brief for Respondents 30; Brief for American Planning Assn. et al. as *Amici Curiae* at 6-7, but in fact the

constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use." FN2 As noted above, the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that subsequent practice is consistent with the original meaning of the Public Use Clause. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 370, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (THOMAS, J., concurring in judgment). At the time of the founding, "[b]usiness corporations were only beginning to upset the old corporate model, in which the raison d'etre of chartered associations was their service to the public," Horwitz, *supra,* at 49-50, so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

> FN2. Compare *ante,* at 2662, and n. 8 (majority opinion) (noting that some state courts upheld the validity of applying the Mill Acts to private purposes and arguing that the " 'use by the public' test" "eroded over time"), with, *e.g., Ryerson v. Brown*, 35 Mich. 333,

338-339 (1877) (holding it "essential" to the constitutionality of a Mill Act "that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations"); *Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576, 581-584, 68 N.E. 522, 524 (1903) (same); *Tyler v. Beacher*, 44 Vt. 648, 652-656 (1871) (same); *Sadler v. Langham*, 34 Ala. 311, 332-334 (1859) (striking down taking for purely private road and grist mill); *Varner v. Martin*, 21 W. Va. 534, 546-548, 556-557, 566-567 (1883) (grist mill and private road had to be open to public for them to constitute public use); *Harding v. Goodlett*, 11 Tenn. 41, 3 Yerg. 41, 53 (1832); *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 393-395, 69 A. 870, 872 (1908) (endorsing actual public use standard); *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 449-451, 107 N.W. 405, 413 (1906) (same); *Chesapeake Stone Co. v. Mo-reland*, 126 Ky. 656, 663-667, 104 S.W. 762, 765 (1907) (same); Note, Public Use in Eminent Domain, 21 N.Y.U.L.Q. Rev. 285, 286, and n. 11 (1946) (calling the actual public use standard the "majority view" and citing other cases).

III

Our current Public Use Clause jurisprudence, as the Court notes, has rejected this natural reading of the Clause. *Ante,* at 2662-2663. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two

distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential conception of "public use" adopted by this Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), cases that take center stage in the Court's opinion. See *ante*, 2663-2664. The weakness of those two lines of cases, and consequently *Berman* and *Midkiff*, fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

A

As the Court notes, the "public purpose" interpretation of the Public Use Clause stems from *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-162, 17 S.Ct. 56, 41 L.Ed. 369 (1896). *Ante*, at 2663. The issue in *Bradley* was whether a condemnation for purposes of constructing an irrigation ditch was for a public use. 164 U.S., at 161, 17 S.Ct. 56. This was a public use, Justice Peckham declared for the Court, because "[t]o irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." *Ibid.* That

broad statement was dictum, for the law under review also provided that "[a]ll landowners in the district have the right to a proportionate share of the water." *Id.*, at 162, 17 S.Ct. 56. Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public-those who owned lands irrigated by the ditch-had a right to use it. The Court cited no authority for its dictum, and did not discuss either the Public Use Clause's original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts, see *id.*, at 158, 17 S.Ct. 56; *supra*, at 2682, and n. 2). Instead, the Court reasoned that "[t]he use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect." *Bradley, supra*, at 160-161, 17 S.Ct. 56. This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," *ante*, at 2662, the Constitution does not embody those policy preferences any more than it "enact[s] Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting); but see *id.*, at 58-62, 25 S.Ct. 539 (Peckham, J., for the Court).

This Court's cases followed *Bradley's* test with little analysis. In *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (Peckham, J., for the Court), this Court relied on little more than a citation to *Bradley* in upholding another condemnation for the purpose of laying an irrigation

ditch. 198 U.S., at 369-370, 25 S.Ct. 676. As in *Bradley*, use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "[o]ther land owners adjoining the defendant in error ... might share," 198 U.S., at 370, 25 S.Ct. 676, and therefore *Clark* also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than *Clark*, see *Strickley*, *supra*, at 531, 26 S.Ct. 301. This case, too, could have been disposed of on the narrower ground that "the plaintiff [was] a carrier for itself and others," 200 U.S., at 531-532, 26 S.Ct. 301, and therefore that the bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." *Id.*, at 531, 26 S.Ct. 301. This Court's cases quickly incorporated the public purpose standard set forth in *Clark* and *Strickley* by barren citation. See, *e.g.*, *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Block v. Hirsh*, 256 U.S. 135, 155, 41 S.Ct. 458, 65 L.Ed. 865 (1921); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *O'Neill v. Leamer*, 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

B

A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. *Id.*, at 679-680, 16 S.Ct. 427. Since the Federal Government was to use the lands in question, *id.*, at 682, 16 S.Ct. 427, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.*, at 680, 16 S.Ct. 427. As it had with the "public purpose" dictum in *Bradley, supra,* the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, *e.g.*, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946); *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 70 L.Ed. 162 (1925).

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under

the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, see, *e.g.*, *Payton v. New York*, 445 U.S. 573, 589-590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), or when state law creates a property interest protected by the Due Process Clause, see, *e.g.*, *Castle Rock v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658, 2005 WL 1499788 (2005); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, *e.g.*, *Goldberg, supra,* while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton, supra,* at 601, 100 S.Ct. 1371, when the issue is only whether the government may search a home. Yet today the Court

tells us that we are not to "second-guess the City's considered judgments," *ante,* at 2668, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, *ante,* at ----6, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

C

These two misguided lines of precedent converged in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Relying on those lines of cases, the Court in *Berman* and *Midkiff* upheld condemnations for the purposes of slum clearance and land redistribution, respectively. "Subject to specific constitutional limitations," *Berman* proclaimed, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." 348 U.S., at 32, 75 S.Ct. 98. That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the Public Use Clause prevented the taking of the appellant's (concededly "nonblighted") department

store. *Id.*, at 31, 34, 75 S.Ct. 98. *Berman* also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was *per se* a "public use" under the Fifth Amendment. *Id.*, at 33, 75 S.Ct. 98. But the very point of the Public Use Clause is to limit that power. See *supra,* at 2679.

More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. See *Midkiff*, 467 U.S., at 240, 104 S.Ct. 2321 ("The 'public use' requirement is ... coterminous with the scope of a sovereign's police powers"); *Berman*, 348 U.S., at 32, 75 S.Ct. 98. Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, see *Mugler v. Kansas*, 123 U.S. 623, 668-669, 8 S.Ct. 273, 31 L.Ed. 205 (1887), in sharp contrast to the takings power, which has always required compensation, see *supra,* at 2679, and n. 1. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. See, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Mugler, supra*, at 668-669, 8 S.Ct. 273. In *Berman*, for example, if the slums at issue were truly "blighted," then state nuisance law, see, *e.g., supra,* at 2680; *Lucas, supra*, at 1029, 112 S.Ct. 2886, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use Clause to overlap with the States' police power conflates these two categories. FN3

FN3. Some States also promoted the alienability of property by abolishing the feudal "quit rent" system, *i.e.*, long-term leases under which the proprietor reserved to himself the right to perpetual payment of rents from his tenant. See Vance, The Quest for Tenure in the United States, 33 Yale L.J. 248, 256-257, 260-263 (1923). In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court cited those state policies favoring the alienability of land as evidence that the government's eminent domain power was similarly expansive, see *id.*, at 241-242, and n. 5, 104 S.Ct. 2321. But they were uses of the States' regulatory power, not the takings power, and therefore were irrelevant to the issue in *Midkiff*. This mismatch underscores the error of conflating a State's regulatory power with its taking power.

The "public purpose" test applied by *Berman* and *Midkiff* also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience ... we are afloat without any certain principle to guide us." *Bloodgood v. Mohawk & Hudson R. Co.*, 18 Wend. 9, 60-61 (N.Y. 1837) (opinion of Tracy, Sen.). Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use-at least, none beyond Justice O'CONNOR's (entirely proper) appeal to the

text of the Constitution itself. See *ante,* at 2671, 2675-2677 (dissenting opinion). I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. *Ante,* at 2666-2668. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking. *Ante,* at 2661-2662. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. Cf. *ante,* at 2675 (O'CONNOR, J., dissenting) (noting the complicated inquiry the Court's test requires). The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." *Ante,* at 2662. It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"-unless the Court means to eliminate public use scrutiny of takings entirely. *Ante,* at 2661-2662, 2666-2667. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

IV

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor ***2687** communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak. *Ante,* at 2676 (O'CONNOR, J., dissenting).

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the

1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman,* cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalayn, Downtown, Inc. How America Rebuilds Cities 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." *Id.*, at 28, 75 S.Ct. 98. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.*, at 28-29, 75 S.Ct. 98. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.' " Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. 348 U.S., at 30, 75 S.Ct. 98. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

* * *

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. See *ante,* at 2662-2664. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws, see *supra,* at 2663. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in Justice O'CONNOR's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

U.S.Conn.,2005.
Kelo v. City of New London, Conn.
545 U.S. 469, 125 S.Ct. 2655, 60 ERC 1769, 162 L.Ed.2d 439, 73 USLW 4552, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437, 10 A.L.R. Fed. 2d 733

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In The Supreme Court of the United States

D. EPPS LACY and JAMES LACY,

Petitioners,

v.

BOARD OF SUPERVISORS OF HALIFAX COUNTY, VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment to the United States Constitution prohibits a local government from exercising its powers of eminent domain to acquire a right-of-way for the purpose of constructing a public road which will be open to the general public as part of the Commonwealth of Virginia's secondary highway system?

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BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Rules of the United States Supreme Court, the Board of Supervisors of Halifax County files this Brief in Opposition to the Petition for Writ of Certiorari filed by D. Epps Lacy and James P. Lacy.

STATEMENT OF THE CASE

A. Procedural History

This case arises out of a condemnation proceeding involving approximately 3 acres of land in Halifax County, Virginia.

On April 6, 2005, the Board of Supervisors of Halifax County ("the County") filed a Petition for Condemnation in the Circuit Court for Halifax County ("the circuit court"). The Petition sought the condemnation of real property owned by D. Epps Lacy and James P. Lacy ("the Lacys") to permit the construction of a public road, as part of the secondary system of state highways, over the route of an existing prescriptive easement. (App. 322a).[1] The Petition described the public purpose for the taking:

> The public use for which the property is to be taken is the construction of a new access road to serve the said King Village property, which access road will provide a safe and adequate means of traveling between State Route 614 and the King Village property, and which will enable access to the King Village property by emergency response vehicles under all weather conditions, and which will enable public school buses to serve the public need

[1] References to the Appendix contained in the Petition for Writ of Certiorari ("Petition") will be denoted "(App. ___)."

> for safe, adequate and convenient public school bus service to school-age children and their families.

(App. 324a).

In their Answer and Grounds of Defense, the Lacys asserted that the taking was for a "private purpose and not for a constitutionally permissible public use." (App. 318a-319a). They further alleged that the taking was motivated by fraud and was arbitrary and capricious. (App. 319a).

On September 14, 2005, an evidentiary hearing was held to determine whether the taking was for a public use. (App. 20a, 98a, 102a). Based upon the evidence and arguments of counsel, the circuit court found as fact that:

> The present road is in such a state of disrepair that the school bus does not go down the road to pick up children from Kings Village. There have been many instances in which fire trucks, fuel trucks and other service vehicles could not get down the road to service the community. The road is so narrow that two vehicles normally can't pass on the road.

(App. 21a). The circuit court further found that the road to be constructed "will become a part of Virginia's secondary highway system . . . . [and] will be open for use by the public." (App. 21a).

Addressing the question of "public use," the circuit court concluded that "[t]he evidence does not establish that a particular group of individuals is using the government's power of eminent domain to take property for that group's benefit." (App. 14a, 22a). Accordingly, the circuit held that the taking was for a public purpose and use. (App. 14a,

22a). Finally, the circuit court found "no evidence of fraud," and found that the taking was not arbitrary or capricious. (App. 14a, 22a).

Following additional proceedings which are not relevant to the issue raised on appeal, the circuit court entered a Final Order on April 24, 2006. (App. 2a). The Final Order recited that the parties had agreed that $50,000.00 represented just compensation for the property. (App. 3a).

The Lacys subsequently filed a Petition for Appeal to the Supreme Court of Virginia. On October 25, 2006, the Supreme Court of Virginia refused the Petition, finding "no reversible error in the judgment complained of." (App. 1a). This proceeding followed.

B. Material Facts

Introduction

The County disagrees with the Lacys' statement of facts. That statement omits crucial evidence which formed the basis for the Board's decision to condemn the property and supports the circuit court's decision upholding the condemnation. Further, the Lacys characterize facts in a manner contrary to the actual factual findings of the circuit court, which heard the evidence *ore tenus*. In accordance with Rule 15(2) of the Rules of the United States Supreme Court, the County will point to misstatements of fact in the Petition.

King Village Trail

"King Village" is an African-American community of 15 homes accessed by a long-established prescriptive easement. King Village Trail is a right-of-way, established by prescriptive easement, across the land of the Lacys that

provides the only means of access to the King Village community. King Village Trail, which is approximately nine-tenths of a mile long, connects State Route 614 to King Village. (App. 110a, 126a, 141a, 144a-147a, 181a, 190a, 297a-298a). In addition to serving the residents of King Village, King Village Trail is also traveled by the Lacys and the Roberts, who live along the road. (App. 152a-153a).

Public Safety and Welfare Concerns

King Village Trail is a dirt road covered with gravel, which frequently washes away. (App. 126a, 145a). Deep pot holes and trenches mar the road and fill with water during rains, preventing vehicular travel. (App. 142a, 152a, 211a). King Village Trail is so narrow that two vehicles cannot pass at the same time, creating a hazard when vehicles are forced to back up to allow another vehicle to pass. (App. 126a, 142a, 151a, 153a, 168a, 184a). When it rains, the road gets slick and vehicles "slide off the road." (App. 151a).

Because the road is not wide enough to support a school bus, children from King Village must wait for the bus at a stop almost one mile from their homes. (App. 135a, 148a, 228a, 232a). Fire and rescue vehicles have experienced difficulty navigating the road, and on occasion have been unable to reach residents of King Village who have called for emergency assistance. (App. 135a, 154a-157a, 167a). One man died in the car of a King Village resident, who was trying to take the man to the hospital when rescue vehicles could not travel the existing road. (App. 155a). One resident, who is a police officer, has been unable to drive his police vehicle on the gravel road when weather conditions render the road impassable. (App. 163a-165a).

One resident of King Village went without heating oil for her home for several days because the poor condition of the

existing road prevented navigation by the delivery truck. (App. 153a-154a). Utility vehicles have also been prevented from reaching King Village due to the condition of the existing road. (J.A. 154a). On one occasion, a funeral hearse was unable to travel down King Village Trail to deliver a body to a cemetary located at the end of the gravel road. (App. 157a-158a).

King Village residents have tried to maintain the existing road by regularly dragging it, covering it with gravel, putting rocks in the potholes, and cutting brush. (App. 146a, 160a-161a, 166a, 282a). The effective life of these improvements, however, has been short.[2] (App. 166a-167a).

The Board's Consideration of the Public Safety Issues

The construction of a road between State Route 614 and King Village had been a topic of debate before the Board for over 25 years. (App. 121a). The residents of King Village shared their concerns about the existing gravel road with the Board. (App. 147a-148a). During public hearings, the Board heard testimonials from residents and citizens concerning the inability of fire and rescue vehicles to provide emergency assistance to residents, as well as other complaints about the condition of the existing road relating to public safety and welfare. (App. 157a, 168a, 202a, 223a).

The Board also considered a Road Viewer's Report, which advised that the proposed road would improve public safety. (App. 185a-188a, 225a). Contrary to the Lacys' characterization of this Report in their Petition, the Report

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[2] At one time, the residents of King Village offered to buy this land from the Lacys, but no agreement could be reached. (App. 147a). The Lacys also offered to donate property for a road, but later withdrew the offer. (App. 194a-195a, 206a, 292a-293a).

was not limited to the needs of the King Village residents, but identified safety issues related to the existing right-of-way. (Compare App. 185a-188a with Pet. For Wr. of Cert., p. 5).

The Board considered alternatives to condemnation, including an alternate route, but found these options unacceptable, principally due to cost. (App. 191a, 201a-202a, 208a, 210a).

The Lacys also suggest in their Petition that the Board approved the taking only to "serve" the residents of King Village. (Pet. for Wr. of Cert., p. 5-6). To the contrary, the Board approved the taking of the right-of-way in the interest of public safety and welfare.[3] (App. 183a, 210a, 213a). As one Board member testified, the road will serve the King Village residents, but also will be "a public road, open to anybody who happens to visit, or emergency vehicles who happen to be needed." (App. 181a). Yet another Board member testified that the road will benefit "[t]he general public, especially the residents." (App. 217a). One Board member received information that the new road would also benefit the Lacys' farming business. (App. 203a-204a). Some Board members personally inspected the road, and testified to its "deplorable" condition. (App. 223a). According to one Board member, "I wouldn't take my pet down that road." (App. 221a).

Further, the circuit court found that the road would be for public use, and the taking would not benefit a particular

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[3] At the evidentiary hearing, the Lacys attempted to make race an issue in the case. (App. 112a - 115a, 130a-134a). The Lacys are white; six of the eight Board members are Caucasian; the residents of King Village are African-American. (App. 114a, 212a-213a). Although this theme pervaded the proceeding below, at the Lacys' insistence, the Lacys have apparently abandoned it for appeal.

group of individuals. (App. 21a-22a). Therefore, the Lacys misstate the purpose of the road.

In their Petition, the Lacys also suggest that the County took their property to permit subdivision of the property in King Village and to increase the property values in King Village. (Pet. For Wr. Of Cert., pp. 12-13). This suggestion is incorrect. The Lacys offered no evidence at trial that the County acquired the right of way for this purpose. Indeed, the parts of the record to which the Lacys cite for these assertions simply do not support those assertions. (Id. at 12-13). Therefore, the Lacys' representations concerning the County's motivation in acquiring this property are inaccurate and unsupported by the record.

King Village Trail will Become a Public Road

Throughout their Petition, the Lacys incorrectly describe King Village Trail as a "driveway." (Pet. For Wr. Of Cert., pp. 4, 7, 10, 14). As the trial court specifically found, King Village Trail is a road, not a driveway, and it was sought for the purpose of constructing a road that will serve the general public, including the Lacys, the Roberts and the residents of King Village. (App. 21a).

The Virginia Department of Transportation ("VDOT") has committed to funding improvements to improve the road and make it part of the state highway system. (App. 172a, 207a). King Village Trail, then, will become a public road. (App. 186a-187a, 214a). Funding to build the road will come from the Commonwealth of Virginia, pursuant to the Rural Addition Policy, and will amount to approximately $190,000.00. (App. 111a, 205a, 207a, 267a, 276a).

ARGUMENT

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT THE COUNTY FROM EXERCISING ITS POWERS OF EMINENT DOMAIN TO ACQUIRE PROPERTY FOR A RIGHT-OF-WAY TO CONSTRUCT A PUBLIC ROAD WHICH WILL BE OPEN TO THE GENERAL PUBLIC AS PART OF THE COMMONWEALTH OF VIRGINIA'S SECONDARY HIGHWAY SYSTEM.

Abandoning claims made at the state level,[4] the Lacys have now elected to proceed solely on a Fifth Amendment theory that the taking at issue is not for a public purpose. The only authority cited in their Petition for Writ of Certiorari is Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005). However, nothing in Kelo or the Fifth Amendment compels the result the Lacys urge. Neither this case nor the Fifth Amendment prohibits the County's exercise of its powers of eminent domain to acquire a right-of-way to construct a public road. In fact, the Lacys have cited no authority for the proposition that a local government may not do so.

Further, the Lacys fail to acknowledge the factual findings made by the circuit court. The circuit court found that the County acquired the property in question to construct a public road, which would benefit the general public. It further found that there was no evidence that a particular group of individuals is using the government's power of

[4] In both the circuit court and state appellate court, the Lacys pursued procedural claims concerning the condemnation. (App. 26a-27a). Those claims were rejected below. (App. 1a, 26a-27a).

eminent domain to take property for that group's benefit. Finally, the circuit court concluded that there was no evidence of fraud, rejecting the Lacys' argument that the taking was a pretext to benefit the King Village residents. (App. 14a, 21a-22a). These findings,[5] which are supported by the record, resolve the question presented to this Court.

A. The County's Decision to Take the Lacys' Property is Entitled to Substantial Deference Because the County Reasonably Believed that Constructing a Public Road would Improve the Safety and Welfare of Those Using the Road.

The Lacys fail to acknowledge the deference this Court gives to legislative decisions to take property for the public good. This Court's Fifth Amendment jurisprudence reflects the "deferential approach to legislative judgments in this field." Kelo, 545 U.S. at 453, 125 S. Ct. at 2664 (discussing Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98 (1954) and Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321 (1984)). This Court has long acknowledged the "'great respect' that [it] owe[s] to state legislatures and state courts in discerning local public needs." Id. (quoting Hairston v. Danville & Western R. Co., 208 U.S. 598, 606-607, 28 S. Ct. 331 (1908)). In practice, this Court has "eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." Id. at 454, 125 S. Ct. at 2664.

Consistent with its "longstanding policy of deference to legislative judgments" in takings cases, this Court has defined the term "public purpose" broadly. Id. at 452, 125 S.

[5] The Lacys do not, and cannot, contend that the circuit court's factual findings are unsupported by the evidence.

Ct. at 2664. In Kelo, for example, this Court found "no basis for exempting economic development from our traditionally broad understanding of public purpose." 545 U.S. at 455, 125 S. Ct. at 2665-2666. If the government has a legitimate purpose and rationally could believe that a taking could promote that purpose, the taking satisfies the requirements of the Fifth Amendment. See id. at 457, 125 S. Ct. at 2667.

The County's decision to acquire land for a right-of-way to construct a public road is based upon concerns for the safety and welfare of those who use the existing gravel road. King Village Trail is not passable by two vehicles, and often not by one vehicle in bad weather. Vehicles backing up to permit passage by another vehicle created a safety hazard. (App. 126a, 142a, 151a, 153a, 168a, 184a). Because fire and rescue vehicles often could not travel down the road, the residents of King Village were literally at the mercy of the road in an emergency. (App. 135a, 154a-157a, 163a-165a, 167a). For example, one man died in the car of a King Village resident who was trying to take him to the hospital because rescue vehicles could not travel the road. (App. 155a). School buses could not use this road, forcing the children who live in King Village to wait at a bus stop almost one mile from their home. (App. 135a, 148a, 228a, 232a). Efforts to maintain the road in good condition were short-lived due to frequent wash-outs, creating a continuing safety problem for those using the existing road. (App. 166a-167a).

On this record, the County's taking was based upon a legitimate purpose that was designed to promote the public good. These facts, as communicated to the Board, plainly show that King Village Trail was unsafe and posed a legitimate public safety issue. Further, the County could reasonably believe that taking the property for a right-of-way to construct a public road would promote the purpose of reducing the safety hazards of the existing road. In fact, the

Road Viewer's Report confirmed that construction of a public road would reduce the existing safety risks. (App. 187a-188a). In light of this evidence, the County was not required to consult with school or emergency personnel, as the Lacys incorrectly claim. (Pet. For Wr. Of Cert., p. 11). Therefore, the taking satisfies the Fifth Amendment. Kelo, 545 U.S. at 457, 125 S. Ct. at 2667.

The Lacys incorrectly suggest that there can be no public purpose for the taking because the King Village residents requested and paid for the acquisition of the property by tendering $12,000.00. (See Pet. For Wr. Of Cert., pp. 8-9). This argument impermissibly "confuses the *purpose* of the taking with its *mechanics*." Kelo, 545 U.S. at 455, 125 S. Ct. at 2666 (italics in the original). "'It is only the taking's purpose, and not its mechanics' . . . that matters in determining public use." Id. at 453, 125 S. Ct. at 2664 (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321 (1984)). Thus, the fact that the King Village residents asked the County to take the property and offered a small sum of money[6] for that purpose, does not change the fundamental purpose of the taking, which is to improve public safety along a road which will be used by the general public.

Further, the Lacys' discussion of the impact of constructing a new public road on the family subdivision ordinances has no place in this case. (Pet. For Wr. Of Cert., p. 4, 12-13). The Lacys offered no proof that the County's condemnation decision was motivated by a desire to permit the King Village residents to subdivide and sell their property. Moreover, as discussed in the County's Statement of Facts, there is no support in the record for the Lacys' argument.

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[6] The money offered by the Lacys sits in escrow, and is but a fraction of the $50,000 the parties have agreed represents just compensation for this property. (App. 2a-3a).

B. The Public Road will Benefit Anyone Using it, not Simply the Residents of King Village.

The Lacys maintain that the taking is unconstitutional because it will serve and benefit a particular class of identifiable individuals. (Pet. For Wr. Of Cert., p. 7). The Lacys' repeated characterization of this road as a "driveway" which will only "serve" the King family lies at the root of their faulty argument. The Lacys continue to insist, as they did below, that this mile-long gravel road is a driveway that will be given to, and serve, only the King Village residents. (Pet. For Wr. Of Cert., p. 10). As the circuit court concluded, the evidence showed otherwise.

Any person who traveled King Village Trail was exposed to the road's safety hazards. Although the residents of King Village may be the most frequent users of the road, any member of the public, including fire and rescue workers, utility workers, and visitors to the Village, would benefit from the construction of a state-owned and maintained road. Indeed, the Lacys themselves will benefit from construction of this road. (App. 21a, 203a-204a).

The County has taken the property to acquire a right-of-way to construct a public road for use by the general public. The road will become part of the secondary highway system of the Commonwealth of Virginia. Thus, the road will be open to the entire public, and will not merely be a private driveway for the residents of King Village. Therefore, the circuit court's conclusion that the taking was for a public use and was not for the benefit of a particular class of identifiable individuals is fully supported by the evidence.

However, even if the taking will benefit the residents in King Village, it is nonetheless constitutional. "[T]he government's pursuit of a public purpose will often benefit individual private parties." Kelo, 545 U.S. at 455, 125 S. Ct.

at 2666. This is particularly true where, as here, a public road is involved. Those individuals who reside or work near that public road will necessarily receive some benefit from the improvement of that road. The natural benefit that inures to those who most frequently use the road, however, does not defeat the public purpose of the road in benefitting the general public.

CONCLUSION

Nothing in the Fifth Amendment blocks the County's taking of this land for the purpose of building a road to be used by the public. In short, the taking satisfies the public use requirement of the Fifth Amendment.

BOARD OF SUPERVISORS OF
HALIFAX COUNTY, VIRGINIA

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